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THE FINAL EFFORTS AT COMPROMISE, 1860–61.

IN the Charleston Convention of 1860 the Democratic party divided into two hostile factions. One contended for Douglas's theory of popular sovereignty; the other struggled for Davis's doctrine of Congressional intervention in behalf of slavery. There and then the South took her first positive step towards disunion. The Presidential election brought her signal defeat. The Democratic leaders in the South then realized their mistake; namely, that their action had been too violent to permit them to return to the national Democratic standard, yet not violent enough to frighten the half-souled politicians of the North into submission. The next *logical* step was secession. Would the South have the courage or the foolhardiness to attempt it? Would the North be so weak as to permit it? Or would she endeavor to conciliate the South by means of another compromise on the slavery question? It was generally known that South Carolina favored immediate secession; she had favored it before, but had postponed action because she felt the need of sympathy and support from the other Southern states. They still hesitated, hoped for the best, and a majority of their population said: Let us await the issue of the coming struggle in Congress.

The opening of the second session of the thirty-sixth Congress, December 3, 1860, was significant and painful. Immediately after the necessary preliminaries in the Senate, Clingman of North Carolina obtained the floor, violently arraigned the Northern states for their past conduct in opposition to slavery

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and made a vigorous plea in justification of the recent and prospective action of the Southern states. The session had continued only a few days before the excited and hostile feelings of the first speaker were shared by almost every member of the Senate. The Southern Senators wore a look of thoughtful and gloomy determination; the lips of the Republicans were firmly set, as if in preparation to meet any danger and to utter the truth, however harsh. The antagonism of party feeling, although as yet subdued, was so intense and personal that for days there was no interchange of what in ordinary times are hourly courtesies; and it was noticed that no member of either party even crossed over to the other side of the chamber.[1]

The whole country now began to realize that the "irrepressible conflict" had again broken out, and with unprecedented violence. South Carolina was fast drifting into the gulf of secession; and it was almost certain that, unless extraordinary precautions were taken, other Southern states would follow her. As compromise had twice saved the country from secession, and perhaps from civil war, there was a widespread belief that it might again be resorted to with success.

It is the purpose of this paper to study the problem of a compromise on the slavery question as it presented itself to the North and to the South in the winter of 1860–61. To fully grasp the meaning of this problem at that time, it is necessary to have in mind at least a clear outline of the history of the development of the slavery question as an issue between the two sections.

In the early days of the Republic, when the first petitions for the abolition of slavery were presented to Congress, the South enunciated the theory that slavery was a municipal institution with which Congress had no more to do than with the school system or local administration. With this theory and a successful effort to keep the Southern representation in Congress about equal to that of the North, the South felt quite contented. But when in 1819 the opposition to the expansion of slavery had become an appreciable political force and sought to shut slavery out

[1] *Congressional Globe*, 2d Sess. 36th Cong. p. 12.

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of the territories, the South saw that it was important to look out for the future, and began to claim a constitutional right to take her slave property into the territories. But as yet neither side understood the meaning of the questions which they were endeavoring to settle; and as the questions had not become intensely practical ones, the Missouri Compromise gave general satisfaction. At this time even Calhoun acknowledged the right of Congress to exclude slavery from the territories.[1] But, two decades later, the South saw herself proportionately losing weight in the political scales, and at the same time needing new territory for slavery. Texas lay on her western border, a natural sister; and, in the cant language of the believers in "manifest destiny," evidently a wise Providence had intended her for one of the states of the Union. At least, she was to become one,—although not without sullen protests on the part of the great mass of the North, and open talk of disunion by the Abolitionists.

Already, under the leadership of Calhoun, the South had enlarged her theory: slavery was municipal, but it was also national to the extent that it was the duty of Congress to protect it in the national territory, and to give it at least incidental encouragement as a state institution. When it was proposed in 1848 to organize New Mexico and California as territories within which slavery was to be prohibited, it was found that great changes had taken place in public opinion. The carrying, by a vote of 106 to 80, of Root's motion instructing the committee to bring in a bill excluding slavery from these territories, showed that the anti-slavery party had become much stronger. The most far-seeing leaders of the South now understood the import of the change. The South must stand firmly and resist every innovation, they said, or in the near future have her institutions shattered. Talk of secession was not a mere bugbear, but so alarming as to frighten some of the wisest heads and to call the venerable Henry Clay from retirement.

But as yet most of the politicians of each section were careful to keep within the well-settled limits of their respective parties;

[1] Von Holst, John C. Calhoun, p. 74.

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and a great majority of the people looked upon the dispute about slavery in the territories as more or less interesting and important to politicians, but not of much practical moment to the rest of mankind. Therefore the leaders of each extreme were unable to carry out their ideas, and had to yield to Clay's great compromise of 1850. Like whipped tigers, cringing yet growling in spite of the lash, the Secessionists and the Abolitionists could only reply to Clay and others, who congratulated the country on the prospects of permanent peace, by calling the compromise insipid folly. The Nashville Convention of 1850, which was inspired by Southern radicals, told the county that, whatever might be the present solution, the diversity of interest between the two sections must ultimately lead to disunion.[1]

It is impossible to unite moral and selfish ideas in a permanent compromise. By 1854 the South felt the necessity of taking another step; namely, declaring that Congress had nothing to do with the question of slavery or freedom in the territories and that the Missouri Compromise was to be annulled. The result of this was to throw down the barriers between the contestants for these antagonistic systems of labor and to let them come to a hand-to-hand fight, a real civil war, in Kansas. In this civil war hundreds from or in every state of the Union took or felt an active interest. Now, for the first time, nearly every man in the land saw that the disputes between the North and the South had ceased to be academical and had become practical and popular. Henceforth the South began to plant herself upon Calhoun's dogma, that slavery was "a good — a positive good." A few years later Seddon of Virginia only expressed a general Southern conviction when he said: "Slavery is with us a Democratic and a social interest — a political institution — the greatest item of our prosperity."[2]

The formation of the national Republican party, in 1856, on the political basis of the exclusion of slavery from the territories and on the moral belief that slavery was a sin, was positive evi-

[1] Von Holst, Constitutional History of the United States, III, 533.

[2] Chittenden, A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention *etc.* p. 285.

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dence that a large number at the North had awakened, and would meet the challenge of the South on whatever ground she might choose. From this time on both sides, as it were, were constantly mobilizing their forces. The brutal attack on Sumner; the ever-increasing fury of Southern passion for slavery; John Brown's mad raids; the growing popularity of the most radical Abolitionists, and their zealous determination to force an issue on the slavery question, — all these greatly hurried the country to the crisis in which it found itself in December, 1860.

With the remark of Maxey Gregg in the South Carolina Convention, that the immediate cause of all was the election of Lincoln,[1] there was a general concurrence; but beyond that there was much diversity of opinion as to the causes and justifications of the plans which the South had already announced. Nevertheless, it will not be impossible to formulate the main grounds of complaint which were given utterance by the Southern leaders. In the Congressional debates of this session the Southern orator generally began his accusations against the North by affirming that it had not kept in good faith that paragraph of the constitution which provided for the return of fugitive slaves; that to the South this was a most important clause, and one without which there could have been no Union; that instead of delivering up the fugitive on claim of the person to whom service or labor might be due, as the constitution provided, most of the Northern states had passed so-called "personal liberty" laws, whose aim it was to annul the execution of that part of the constitution and the act of Congress relating to fugitive slaves.

One of the most important ideas in the formation of this government, so the Southern complaint continued, was the equality of the states; yet a party, ay, almost an entire section of the country, had declared that the South should be excluded from an equal share in the territory of the United States, which was acquired by common blood and common treasure. More than this, the Republican leaders had asserted this purpose in the face of a recent decision of the Supreme Court of the

[1] McPherson, Political History of the United States during the Rebellion, p. 17.

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United States, declaring that Congress had no right, under the constitution, to exclude slavery from the territories; and they had elected a President who had said that, if he were in Congress, he would vote against permitting slaveholders to take their slave property there.

For nearly three-quarters of a century, it was added, there had been an ever-increasing hostility toward all the institutions of the South. Its best men were denounced as soulless oppressors, and its social organization was said to rest upon a "sum of all villanies." The President elected by these foes of the South had proclaimed that the country could not remain half slave and half free; which meant that by changing the members of the Supreme Court slavery should be kept out of the territories, and by checking its further extension and forming a cordon of free states about the slaveholding section, slavery might soon be choked to death.

There were two escapes, the complaint concluded, from the doom which the Northern radicals had planned for the South: one was in secession, by which the South might obtain entire control of her own future; the other was by a constitutional prohibition which should prevent the contemplated action of the Republican party and gag the band of agitators who were making the slaveholder's life a burden, and who any day might be the cause of a murderous uprising on the part of the slaves.[1]

The chief replies of the North may be put into a few sentences. That some of the Northern states had passed laws tending to hinder the execution of a certain provision of the constitution and certain acts of Congress, was not denied; but it was not intended that this should be their effect. Their sole aim was to prevent the seizure and enslavement of free black men, which the cruel enactments of the fugitive slave law had rendered quite easy. Wherever these laws stood in the way of any of the provisions of the constitution and acts of Congress, they

[1] *Cf.* South Carolina's Address and Declaration of Causes, McPherson, pp. 12–16; Toombs, *Globe*, pp. 267–71; C. C. Clay, *Ibid.* p. 486; Reagan, *Ibid.* pp. 389–93; Wigfall, *Ibid.* p. 1400; Seddon, Chittenden's Report *etc.* pp. 91–98; Pryor, *Globe*, p. 602.

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were null and void; and being inoperative they ought to be, and probably soon would be, repealed.[1]

It was true that the equality of the states was recognized in the constitution, and the North had no desire to disturb that equality. She proposed that the South should have the same privileges in the territories that she had; that is, that both might go there and have free institutions. If the Supreme Court had decided that the Southerners had a right to take their slave property there, why did they not go? The North had no means of preventing them until that court should change its opinion.[2] Whatever might be the dislike of slavery entertained in the North, there was no considerable number of men who in any way desired to interfere with slavery within the states. The burden of slavery rested upon the individual states of the South, and the national government had no desire to share their responsibility.[3] As evidence of this, the Northerners were willing to give the most ample pledges. For the inherent antipathy between Northern and Southern society, there seemed to be no remedy either in or out of the Union. Freedom of thought and of speech were much older than the constitution, and any attempt to check them would only increase the cause of complaint.

Between these extreme positions stood most of the Northern Democrats and a considerable number of the more moderate Southern members. This class was represented by the venerable Senator Crittenden of Kentucky, one of the oldest and most highly esteemed members of Congress. From first to last he stood patient, patriotic and hopeful, a veritable Nestor in the confused and excited councils of that stormy session. As early as December 18, 1860, he brought forward some carefully prepared resolutions which he hoped might be made a part of the constitution.[4] These resolutions are especially important,

[1] C. F. Adams, *Globe*, Appendix, pp. 124 *seq.*; Ashley, *Ibid.* pp. 61 *seq.*; Trumbull, *Globe*, pp. 1380–82; Corwin's Report, no. 31, 2d Sess. 36th Cong. vol. 1.

[2] Trumbull, *Globe*, p. 1380, defended this thesis with special ability.

[3] Henry Wilson gave this point fullest expression, *Globe*, p. 1402; although Seward, Lovejoy and many others agreed.

[4] *Globe*, p. 114; McPherson, p. 64.

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because they form the basis of nearly all the other propositions made during the session and cover ground on which, had circumstances been somewhat different, it might have been possible for the North and the South again to meet in compromise. Their leading features were a return to the Missouri Compromise line, extended to the Pacific. They provided that in *all the present and future* territory north of that line slavery should be prohibited; south of it, slaves should be protected as property by authority of the federal government. States formed from this territory should be admitted with or without slavery, as their constitutions might determine; and Congress should have no power to abolish slavery in any territory under its special jurisdiction without the consent of the states within whose boundary said territory was situated. The transportation of slaves from one state or territory to another where slavery was lawful, should not be interfered with by Congress. The United States should pay to the owner the full value of his fugitive slave, in all cases where arrest was prevented or escape effected by intimidation or violence; the United States should have a claim against the county in which the hindrance occurred; and it, in turn, might sue the wrongdoers. Neither the foregoing nor the other provisions of the constitution in regard to slavery should be changed by any future amendment, nor should Congress have the right to interfere with slavery within any of the states. Crittenden explained the object of his resolutions as follows:

> I have endeavored to look with impartiality from one end of our country to the other; I have endeavored to search up what appeared to me to be the causes of discontent pervading the land; and, as far as I am capable of doing so, I have endeavored to propose a remedy for them.[1]

Before noticing what kind of a reception Crittenden's plan met, let us briefly review the other measures which were initiated for the same purpose both in and out of Congress.

On the fourth day of the session, December 6, Powell of Kentucky offered in the Senate a resolution which proposed the

[1] *Globe*, pp. 112 *seq.*

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appointment of a Committee of Thirteen, to which should be referred as much of the President's message as related to the present condition of the country; and that said committee should inquire and report if any additional legislation within the sphere of the federal authority were necessary for the security of property in the states and territories, and if any constitutional amendment were necessary to insure the equality of the states.[1] The members of this committee were Senators Powell, Seward, Collamer, Bigler, Hunter, Toombs, Davis, Rice, Crittenden, Douglas, Wade, Doolittle and Grimes. On December 31, the committee reported that it had been unable to arrive at any general plan of agreement.[2] But their journal reveals some interesting proceedings.[3] Crittenden offered his resolutions at the first meeting; but they failed to obtain a majority. In the vote on the first clause Toombs and Davis voted in the negative along with the deepest-dyed of the "Black Republicans."[4] Seward submitted some resolutions which declared that no amendment to the constitution should give to Congress the right to interfere with slavery within the states; that the fugitive slave law should be so amended as to give the alleged fugitive a right to trial by jury; that the states be requested to repeal all laws which contravene the constitution of the United States or any laws made in pursuance thereof. Against these propositions, except in the vote on the first clause, the Southern Democrats presented an unbroken front.[5]

What the leaders of the South wanted, is to be found in the resolutions offered by Toombs. These differed from any of the foregoing mainly in that they provided that property in slaves should have the same protection from the government of the United States as any other property; that persons committing crimes against slave property in one state and fleeing to another should be delivered up as criminals; and that Congress should have power to pass laws to punish persons engaged in any act tending to disturb the tranquillity of any state.[6] Of course, none of these measures found any support among the Republicans.

[1] *Globe*, p. 19. [3] Senate Reports, 2d Sess. 36th Cong. no. 288.
[2] *Ibid.* p. 211. [4] *Ibid.* p. 5. [5] *Ibid.* pp. 10, 11. [6] *Ibid.* pp. 2, 3.

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Davis's contribution toward compromise must have astonished even his brother secessionists. His leading proposition was to make it a part of the constitution that property in slaves vested under the law of any state "shall not be subject to be divested or impaired by the local law of any other state, either in escape thereto, or transit or sojourn of the owner therein."[1] This would practically have given the slave states the right to legislate slavery into the free states, since the latter would have been unable to keep slaveholders from coming and bringing their slaves with them, and retaining them so long as they might please to "sojourn."

Two days before Powell had proposed his resolution for a Senate committee, the House had decided upon a Committee of Thirty-three, one from each state, who should consider the same questions as the Senate committee. Nearly six weeks of anxious waiting and feverish hope elapsed before this committee was able to obtain a majority of a quorum for any measure. Even then the majority was made up of some men who said that they would not support all the propositions when put upon their passage in the House.[2] These propositions may be summarized under four heads: first, it was to be stated in the constitution that no amendment having for its object *any interference* with slavery in the states should ever be made, unless the same should originate with a slave state and be assented to by all the states; second, New Mexico was to be admitted as a state without further action of Congress; third, the fugitive slave law was to be so amended that it should be more efficient for the arrest of fugitive slaves; fourth, the act for the rendition of fugitives from justice was to be so amended as to give the federal courts exclusive jurisdiction and to make the indictment *prima facie* evidence of guilt.[3] So great had been the diversity of opinion among the members of this committee that, besides this majority report, distinct minority reports reached the as-

[1] Senate Reports, 2d Sess. 36th Cong. no. 288, p. 3.

[2] Reports of Committees, 2d Sess. 36th Cong. vol. 1. Report 31, Minority Report of Messrs. Love and Hamilton, p. 1.

[3] Bingham's summary, *Globe*, Appendix, p. 82.

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tounding number of seven. Of these, that of Charles Francis Adams was the most noteworthy. With the exception possibly of Crittenden, Adams had been, in regard to this question, the most conciliatory and clear-sighted of all the members of Congress.[1] He stated that the resolution which read:

> Peaceful acquiescence in the election of the Chief Magistrate, accomplished in accordance with every legal and constitutional requirement, is a high and imperative duty of every citizen of the United States,

met with opposition on the part of several members, although it was entirely relevant.[2]

Besides the propositions already mentioned, there were a score of others offered by different members of Congress. Doubtless many of these were submitted in the hope that they might in some way help to preserve the Union; but more than one of them reads as if it were presented with the aim of saving Buncombe from secession. The majority of these resolutions were only more or less mollified forms of the Crittenden resolution and therefore do not call for special attention. Two, however, Hunter's and Vallandigham's, are worth noticing, as an illustration of the strange methods to which the "madness" of this winter had driven many.

Besides "guarantees of principle," much the same as were proposed in the Crittenden resolutions, Senator R. M. T. Hunter of Virginia believed that there ought to be "guarantees of power," in which the South should have the right of veto, in order to prevent any improper use of patronage by the President, and also to prevent the assertion on the part of the stronger section that there was some higher law which nullified the "guarantees of principle."[3] Calhoun's plan of a dual executive was revised and improved. Each section should elect a President, to be called first and second; the first was to serve four years as President, after which time the second should succeed him for the next four years, and be re-eligible; every

[1] *Cf.* Speech of January 31, 1861, *Globe*, Appendix, p. 124.
[2] Reports *etc.* Adams's Minority Report, p. 2.
[3] *Globe*, p. 329.

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valid treaty should receive the signature of both Presidents and the assent of two-thirds of the Senate; and every law, besides the constitutional majority, should have the assent of both Presidents or, in the event of a veto by one of them, the assent of a majority of the Senators from the section from which he came. The Supreme Court should be made up of five judges from slave and five from free territory; and any state might cite any other before this tribunal; and any state found in default might be retaliated upon by denial of various privileges to its citizens and commerce.[1]

Vallandigham of Ohio proposed to cure sectionalism on the theory of *similia similibus*. The United States should be divided into four sections, to be known as North, West, Pacific and South; on demand of one-third of the Senators of any section, a vote should be taken by sections, and a majority of the Senators from each section voting should be necessary for the adoption of any measure; the choice of President and Vice-President should require a majority vote of the electors in each of the four sections; the concurrence of a majority of the states should be necessary to the choice of President by the House of Representatives, and that of a majority of the Senators from each section to a choice of Vice-President. No state might secede without the consent of the legislatures of all the states of the section to which it belonged.[2]

For various reasons, to be noted later, it was generally feared, the country over, that none of the compromises before Congress would be accepted by both the North and the South. The cotton states and New England were disinclined to modify their already expressed opinions; but large portions of the people of the states bordering on Mason and Dixon's line were quite conciliatory. They had sometimes voted with the extreme radicals, but their blood had never boiled with an intense hatred of the other section, since their proximity to it enabled them to understand it better. Furthermore, the great influence here

[1] Senator Simmons of Rhode Island called this the "Siamese pattern." *Globe*, p. 406.

[2] *Globe*, Appendix, pp. 242, 243.

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was that of *personal interests* — which are never forgotten and rarely waived. The border states early appreciated their danger; they knew that if war should come, it would be waged on their soil and largely at their cost. Hoping to avoid this, the General Assembly of Virginia, on the 19th of January, 1861, passed a resolution declaring that as Virginia deprecated the dissolution of the Union and desired to restore it to the condition established by the Fathers of the Republic, she invited all the states to send commissioners to Washington, February 4, to confer with those of Virginia, and join "in an earnest effort to adjust the present unhappy controversies."[1] The shortness of the time intervening before the adjournment of Congress, March 4, made it impossible for the states to send delegates chosen by the people. Twenty-one states sent representatives, some of whom were appointed by the legislatures and others by the governors of the respective states. This was the famous "Peace Convention."

There was a more general feeling among the members of this convention than among those of Congress or any of the committees, that some compromise was both necessary and right. The same day that the Peace Convention assembled, the Montgomery delegates began the organization of the Confederacy; consequently, there were but few Secessionists in the Washington convention. Nearly all its members were impressed by the responsibility of the occasion. Ex-President Tyler was chosen president of the convention; and it was decided that the proceedings, in imitation of the great Constitutional Convention, should be secret. There seemed to be considerable likelihood that the convention would hit upon a compromise which would be quite generally accepted. But as soon as the reports were brought in and the debates began, a divergence of opinion became more and more manifest. It was soon easy to note three distinct classes. One was represented by Seddon of Virginia, who had come to the convention with the main object of putting slavery in such a firm position that no future action of the government could disturb it. Another

[1] Chittenden, pp. 9, 10.

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counted among its members such men as George S. Boutwell of Massachusetts and David Dudley Field of New York, who could in no way appreciate the fact that any action of the North could endanger the country, or that the South had any reason for demanding amendments to the constitution in order to render the Union tolerable. Between these two stood the third class, sufficient in numbers to turn the scale either way, who represented different states and parties and interests, and whose chief aim was to prevent a war at the price of almost any compromise. Such were the "dough-faced" Democratic members from the Northern states; such also was William E. Dodge of New York, — at his best a philanthropist of a high order, but now the representative of the New York Chamber of Commerce, who came not simply to save the Union but also to see that the pockets of the New York merchants should not suffer by any alienation between Northern and Southern business interests.[1]

When the Northern extremists saw the purpose of the Southern party, they resolved to put the latter's professed love of the Union to a test. At different times, resolutions were proposed which asserted that "the union of the states under the constitution is indissoluble"; that "the highest political duty of every citizen of the United States is his allegiance to the federal government"; but in each case these resolutions were thrust aside, and the convention was reminded by the Southern members that the object of assembling was to *conciliate* and not to pass resolutions which would only have the effect of making the discontented more restless.[2] This was a very remarkable position, if we remember that the Southern states represented in the convention had declared that the United States should neither collect the revenue in the seceded states nor retake its own forts; or, if it should, they would at once make common cause with the cotton states. Nor would any of the Southern border states or their delegates give their pledge of assistance towards preserving the Union in whatever way might be found necessary, in case their own propositions should be accepted by the

[1] *Cf.* Chittenden, pp. 190 *seq.*

[2] *Ibid.* pp. 408–9, 446–48.

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North. Slavery not only must be guaranteed and nourished in almost every conceivable way in the Southern states and in the territories south of 36° 30′, but it must be protected by the constitution, and all future territory south of that line be secured for slavery. In the language of the chief debater from Virginia, Seddon: "She insists on the provision for future territory. She and her sister states plant themselves upon it."[1] Brockenbrough of the same state only uttered the truth more plainly than his colleagues when he said: "We cannot accept these propositions as a boon from any section. We must have them as a right or not at all."[2]

A philosopher has said that out of discord proceeds the fairest harmony; but certainly Pythagoras was not thinking of politics when he made his generalization. The Peace Convention had been in session but a few days when it became absolutely certain that no harmonious conclusion could be reached. After more than three weeks of tedious and futile wrangling, the convention succeeded in getting through a series of resolutions intended as an amendment to the constitution, which, as Crittenden himself said, were about the same as his own, except that the provision as to slavery in all future territory south of 36° 30′ was omitted.[3] So small was the majority by which the separate resolutions were passed, that the convention feared to take the usual vote on the adoption of the resolutions as a whole, lest they might be rejected. Barringer of North Carolina prophesied that "this hollow compromise will never satisfy them [the Southern people] nor will it bring back the seceded states."[4]

By following as many of these propositions as were brought to a vote in either House of Congress, and by going deeper into the debates of this momentous session, we shall get a clear insight into the possibilities, the difficulties and burning antagonisms which confronted these final efforts at compromise.

The most objectionable part of the Crittenden resolutions was the clause which provided that slavery should exist in all territory now held, or hereafter acquired, south of 36° 30′. It was

[1] Chittenden, p. 92.
[2] *Ibid.* p. 280.
[3] *Ibid.* p. 570.
[4] *Ibid.* p. 436.

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asserted by almost every Southern member of Congress that all the South asked was a return to the constitution as understood by the Fathers; yet she would not think of remaining in the Union unless this line were drawn in the interest of slavery. Why this clause was so important to the South is easily understood. She saw in it a possibility of boundless expansion — expansion so vast as to give her the balance of power for an unlimited period. Ten Eyck of New Jersey, as well as many others, clearly saw that the passage of such an amendment to the constitution would be tantamount to an invitation to the South to begin filibustering in Mexico, Cuba and Central America, with the assurance that these regions might be made part of the Union without much trouble.[1] The purpose of the clause was so plain that even a timid Northern Democrat had courage enough to say:

> If we expand, it must be in a southern direction. It has been a favorite policy of the Democratic party to acquire Cuba. . . . We discussed all last winter the propriety of assuming a protectorate over Mexico, with the view, in the process of time, as our population increased, to absorb and assimilate that people and make it a portion of our nation.[2]

With few exceptions, the Southern members demanded at least as much as the Crittenden resolutions offered. Nearly all from the border states averred that nothing less would "allay the fears of the South." Crittenden himself reasoned that, unless his or similar compromise measures were passed, the Union would go to pieces. Without recognizing any right of secession on the part of the South, he thus spoke of the enormous concessions proposed: "Sir, it is a cheap sacrifice. It is a glorious sacrifice."[3]

The well-settled conviction of most of the Republican representatives was stated by Senator Wilkinson of Minnesota. He said that his state and the Northwest favored standing on the *existing* constitution, and doing justice to all. "No one has a right to ask us to give bonds for our good behavior."[4]

[1] *Globe*, p. 682.
[2] Latham of California, *Globe*, p. 403.
[3] *Globe*, p. 113.
[4] *Ibid.* p. 1369.

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Several Republicans, like Senator Trumbull of Illinois, and Wilkinson, would have been willing to return to the Missouri Compromise, — which the pro-slavery party had so ruthlessly destroyed in 1854, thinking that thereby the country might again enter upon a long period of freedom from the agitation of the slavery question.[1]

All but one or two days of the session had elapsed before the Senate came to a final vote on the Crittenden resolutions. They were rejected by a vote of 20 to 19.[2] Crittenden sat silent, tearful and almost broken-hearted.

Of the resolutions reported by the Committee of Thirty-three only the first clause received a constitutional majority of both Houses. The report of the Peace Convention had been submitted to both branches of Congress a few days before. On March 1, in order to bring the propositions at once before the House, a motion was made to suspend the rules. Some of the Secessionists and the extreme Republicans united in their opposition to the reception of the report. Lovejoy objected to it "*in toto coelo.*"[3] Craige of North Carolina was "utterly opposed to any such wishy-washy settlement of our national difficulties."[4] Leake of Virginia "regarded this *thing* as a miserable abortion, forcibly reminding one of the old fable of the mountain and the mouse; nevertheless, he was willing to let the mouse in, in order to have the pleasure of killing it."[5] Hindman of Arkansas thought the proposition "unworthy of the vote of any Southern man."[6] Garnett of Virginia was anxious to have the rules laid aside, so as to get a chance to express his "abhorrence of these insidious propositions conceived in fraud and born of cowardice."[7] Thaddeus Stevens interjected, in the general confusion which prevailed: "I think we had better go on with the regular order. We have saved this Union so often that I am afraid we shall save it to death."[8] On March 1, by a vote of 93 to 67, — two-thirds being necessary to carry the motion, — the House refused to suspend the rules.[9] This is the near-

[1] *Globe*, pp. 1369, 1381.
[2] McPherson, p. 66.
[3] *Globe*, p. 1331.
[4] *Ibid.* p. 1333.
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.* p. 1332.
[9] *Ibid.* p. 1333.

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est approach these propositions ever made to entering the House.

In the Senate they were but little more successful. Crittenden, as ever, had it for his chief aim to "pacify the country"; and, thinking the Peace Convention resolutions more available than his own, which were offered as an amendment, he favored the former.[1] Most of the Southerners thought these propositions worse than nothing. Hunter preferred the present position under the constitution, with the Dred Scott decision as its exposition.[2] Mason, the other Senator from the state that had issued the call for the Peace Convention, said that he would consider himself a traitor if he should recommend such propositions.[3] Wigfall of Texas, however, bore off the palm by saying: "If those resolutions were adopted, and ratified by three-fourths of the states of this Union, and no other cause ever existed, I make the assertion that the seven states now out of the Union would go out upon that."[4] Many of the Republicans were equally strong in their opposition to them. Chandler of Michigan spoke the substance of the opinions of several on his side of the Senate when he expressed himself in the language of the "stump" by saying: "No concession, no compromise, — ay, give us strife, even to blood, — before a yielding to the demands of traitorous insolence."[5]

Late on the 2d of March the Senate rejected the propositions by a vote of 28 to 7.[6] Nor does it seem strange that so unsympathetic a body as the Senate should look upon them with such disfavor, when we learn that John Tyler, the president of the convention that passed them, and Seddon returned to their state and denounced the recommendations of the Peace Convention as a delusion, a sham and an insult to the South.[7]

The thoroughly sectional character of the diversity of convictions becomes still more apparent when we compare the opinions prevalent in the extreme South and in the extreme North. The action of Congress showed the resultant of these conflict-

[1] *Globe*, p. 1310.
[2] *Ibid.* p. 1307.
[3] *Ibid.* p. 311.
[4] *Ibid.* p. 1373.
[5] *Ibid.* p. 1773.
[6] *Ibid.* p. 1405.
[7] McPherson, p. 6.

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ing forces rather than the extent of their antagonism. As the border states, occupying the middle position, held the average opinion, so the extreme states were in the widest opposition upon the question of compromise. Hawkins of Florida told the House, when the question was first touched upon, that the day of compromise was past and that he and his state were opposed to all and every compromise.[1] Pugh and Clopton of Alabama both spoke boldly for secession and against any temporizing policy.[2] Congress had been in session but ten days, and neither of the committees on compromise had had time to report, when a large number of the members of Congress from the extreme Southern states issued a manifesto declaring that "argument was exhausted" and that "the sole and primary aim of each slaveholding state ought to be its speedy and absolute separation from an unnatural and hostile Union."[3] Before the Committee of Thirty-three made its report, most of the cotton states had seized all the United States arsenals and navy-yards and ships within their borders.[4] Senator Wigfall of Texas, in whose boundless loquacity lurked many a truth, assured the Senate that nothing short of a resolution declaring that each state had a right to secede would induce the Gulf states to even entertain propositions of compromise.[5]

The boldness of these facts is startling, even when viewed at this distance. They make it perfectly evident that it was not the constitution which the South was desirous of saving, but the institution of slavery which she was determined to preserve. Likewise on the Northern side we find that those who were courageous logical and intellectually vigorous in political speculation, considered the constitution of less importance than the development of their ideas of freedom. These people were called Abolitionists. Although their political strength was not great, some one of their many ideas found sympathy in the mind of almost every Northerner of education or of clear moral intentions. This explains how John A. Andrew could be

[1] *Globe*, p. 7.
[2] *Ibid.*
[3] McPherson, p. 37.
[4] *Ibid.* 27, 28.
[5] *Globe*, p. 1373.

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elected governor of Massachusetts, although known to have presided over a John Brown meeting. The purpose of the Abolitionists was "the utter extermination of slavery *whereso-ever* it may exist."[1] Wendell Phillips surprised very few Abolitionists when, knowing that the Confederacy was forming, he rejoiced that "the covenant with death" was annulled and "the agreement with hell" was broken in pieces, and ex-claimed:

> Union or no Union, constitution or no constitution, freedom for every man between the oceans, and from the hot Gulf to the frozen pole![2] You may as well dam up Niagara with bulrushes as bind our anti-slavery purpose with Congressional compromise.

Congress had to consider such facts as these, as well as the compromises which were proposed. Stephen A. Douglas felt compelled to say, as early as January, 1861, that there were Democrats in the Senate who did not want a settlement.[3] And it was plain to all that most of the Republicans discouraged further concessions. Nor would a constitutional amendment have been possible unless the Northern members had first rec-ognized the seven states as being out of the Union, for it would otherwise have required the support of all but one of the states that were still active. That the "personal liberty" laws were a violation of the constitution, and that the execution of the fugi-tive slave law of 1850 had been unconstitutionally obstructed, were unquestioned facts, directly or indirectly recognized by many of the Republican leaders. Nevertheless, the North was much more inclined to continue in this unconstitutional position than to yield to the demands of the South. If the South had lent her support to Seward's propositions they would have removed — as far as anything could — the just ground of complaint on the part of both against the fugitive slave law and the per-sonal liberty bills, and taken away all likelihood of invasion from the North in the near future. But Seward's plan did not touch the dispute about slavery in the territories, much less the

[1] William Lloyd Garrison, IV. 1.
[2] Speeches *etc.* pp. 343, 354.
[3] *Globe*, p. 661.

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question of establishing it in all present and future territory south of a certain line; nor did it do away with the objection to the immorality of slavery under all conditions. Where is the clause in the constitution which justifies secession in case this should be refused? asked the more conservative Republicans, when accused of endangering the Union. Even if there had been such a clause, and the feeling of antagonism between the North and the South had reached such a pitch of intensity as it did, it is certain that most of the Abolitionists and many of the Republicans would still have stood in the way of further concessions.

At the opening of Congress, Iverson, speaking for the South, said that there was a deep and enduring enmity between the North and the South. "We are enemies as much as if we were hostile states."[1] This hostility between the two sections was only less general — not less strong where it existed — on the part of the North. There were hundreds of thousands who looked upon the slaveholders of the South as the embodiment of all that was worst in our social and political institutions. They have gone mad in their wickedness, said the extreme Abolitionists, and they are determined to destroy the government in case they cannot continue to rule it; talk of compromise is folly; the South must be made to feel that freedom is a power quite equal to that of slavery.

The campaign of 1860 had been little less than a drawing up of the antagonistic forces in battle array after they had understood the reason of mobilization. On December 22, 1860, Lincoln wrote to Alexander H. Stephens: "You think slavery is right and ought to be extended, while we think it is wrong and ought to be restricted."[2] That was the essence of the whole question. Now, looking at the matter historically, and remembering that these two moral convictions — for such they were — had been shaping and solidifying almost from the very day the Union began its existence; remembering, too, that they had grown with great rapidity in spite of threats of secession, in spite of actual secession and the prospect of civil war, — was

[1] *Globe*, p. 12. [2] Stephens, The War between the States, II, 267.

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not here an "irrepressible conflict" if there ever can be such a thing? Senator Bigler of Pennsylvania, with the typical insipidity of a "dough-face" and the borrowed look of a wise statesman, said that whatever remedies were adopted ought to be "complete and final, reaching to the root of the disease," so that "conscientious enemies of slavery" should feel that they had "no responsibilities to bear and no duties to perform."[1] How can a man *conscientiously* bargain or compromise away his conscience? Yet in such an impossibility was the only escape from a conflict in the Union, unless the one idea or the other should die a natural death. It was therefore not so much profound as logical thinking that brought Lincoln to the conclusion, in 1858, that the country must become all slave or all free. This the great majority of each section had now come to see: but only the extremists upon each side, who in their reasoning ran ahead like scouts before an army, saw the meaning of the coming conflict; namely, that the two ideas were diametrically opposed; that the moral conviction and personal interest of each side were greater than their existing love for the letter or the spirit of the constitution; and that these convictions and interests were bound to be contested for in compliance with or in open violation of the constitution, as the circumstances of the case might dictate.

Not only was even a relatively permanent compromise impossible in itself, but an agreement to any of the leading Southern propositions would have been a fatal blow to Democratic sovereignty. The pitiable decay into which the government had fallen on account of the influence of the past and the present spirit of compromise was all too truly pictured in Wigfall's insolent boast in the Senate:

> The *Star of the West* swaggered into Charleston harbor, received a blow planted full in the face, and staggered out. Your flag has been insulted; redress it, if you dare. You have submitted to it for two months, and you will submit to it forever.[2]

Was not almost the last breath of life choked out of the government that would permit itself to be stripped of its prop-

[1] *Globe*, p. 492. [2] *Ibid.* p. 1373.

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erty in a hundred places and to the value of millions of dollars, and still not raise a finger in defence?

The last stage in the evolution of the Southern theory in regard to slavery and the constitution was not only that Congress must guarantee slavery south of a certain line, nor merely that a minority must have as much weight in the government as a majority, but that *a minority might change the constitution*, or secede in case its demands were refused. The acceptance by the North of the Crittenden resolutions — and nothing less would have been even considered by the South — would have conceded all this. At the thought of such a concession at least a score asked: What counter-pledges are we of the North to have? What guarantee will you give that next year you will not make new demands,[1] such as the suppression of free speech and of the free press, or ultimately, that there shall be no laws against slavery?[2] To these questions there was but one answer. Whatever temporary effect a compromise — if any compromise were possible — might have exercised, it was certain that the South would secede in the future unless the North, the vast majority, would consent that the country might become "all slave." That would have been a compromise indeed, but a compromise at the expense of every political idea which had made the United States great.

FREDERIC BANCROFT.

[1] Trumbull, *Globe*, p. 313.

[2] Lovejoy, *Globe*, Appendix, p. 85.

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THE FORMATION OF THE NORTH GERMAN CONFEDERATION.

THE events attending the establishment of the North German Confederation are of exceptional interest to the student of public law because in them he can study the process by which a federal state comes into existence. From 1815 to 1866 there were in Germany nearly forty sovereign states, united in a league similar to that which existed in this country just previous to 1789. The most formidable obstacle in the way of national unity was the rivalry between the two most powerful states of the confederation. After Sadowa and the consequent exclusion of Austria from Germany, the twenty-two states north of the Main formed under the leadership of Prussia the North German Confederation, — a change similar to that by which in this country a league of thirteen states was transformed into a federal state. Even in the process by which the transformation in Germany was effected there are many points of resemblance to the American instance.

I.

Before examining the nature of this transformation, its history must be briefly studied. On the 14th of June, 1866, the Diet having decreed mobilization against Prussia, the Prussian envoy announced the withdrawal of that state from the confederation. Already on the 10th of June, when the crisis appeared imminent, Bismarck had addressed a circular dispatch to the Prussian envoys at all the German courts, except the Austrian, in which he had inquired whether in case of the anticipated dissolution of existing relations the governments would be disposed to form a new confederation upon a different basis. The outlines of the proposed constitution which this dispatch contained have been appropriately called the first draft of the constitution of the North German Confederation. A favorable

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issue of the negotiations which were thus inaugurated was assured by the victory won by Prussia at Sadowa on the 3d of July, followed on the 26th of the same month by the preliminaries of Nicolsburg, and on the 23d of August by the treaty of Prague. The terms agreed upon cleared the field for the work of political reorganization by the withdrawal of Austria, and limited it to the region north of the Main.

Five days before the conclusion of the treaty of Prague, what is known as the August treaty was signed in Berlin on the basis of a draft which Bismarck had as early as the 4th of August laid before all the states of North Germany, with the exception of those that were marked for incorporation in the Prussian monarchy. The sixteen states that signed this treaty on August 18th were shortly afterwards joined by the remaining states north of the Main. Without prejudging the case, but merely to show the part which this treaty plays in the discussion, Laband's remark may be quoted, that "the treaty of the 18th of August, 1866, forms the international foundation for the erection of the North German Confederation." Seydel, as we shall see, holds the North German Confederation and the empire to be an international relation of which this treaty is the only foundation. The treaty was to hold for one year unless earlier terminated by fulfilment. Before this period should elapse the international relation formed by the treaty was to be converted into a constitutional relation on the basis of the Prussian draft of the 10th of June. The constitution was to be formed by the governments in agreement with a Reichstag, chosen according to the electoral law of the 12th of April, 1849. It was a fortunate circumstance, as Karl Binding has recently pointed out, that this law, destitute though it was of legal validity, and yet expressing the views of German liberals as to the conditions of popular representation, enabled the governments to avail themselves of the co-operation of a national Reichstag;[1] whereas in America the particularistic origin of the Philadelphia Convention gave support to the opinion that the Union was created by the states.

The first thing to be done by the governments in carrying

[1] Karl Binding, Die Gründung des Norddeutschen Bundes, p. 21.

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out the terms of the August treaty was to make provision for the election of the Reichstag. To this as the first step Bismarck had from the beginning attached the greatest importance; for without the necessity of agreement which was thus brought home to the governments, their deliberations might have been interminable and fruitless. Accordingly, in the several states electoral laws were enacted, differing in only unimportant respects from the law of the 12th of April, 1849. The election of members of the constituent Reichstag under state law is such an anomalous proceeding that Binding sees in it a deviation from the stipulations of the August treaty, which, as he thinks, made it incumbent on the governments to provide for the holding of the elections under the law of 1849 without recourse to state legislation. But this raises the question which will be discussed further on, whether the form which the national co-operation assumed has juristic importance. The Philadelphia Convention, though made up of state delegations casting the vote of their states, nevertheless established a national government. An amendment made to the electoral law by the Prussian Landtag required that the constitution should be submitted for its approval; an example which was followed in most of the other states.

The necessary steps having been taken for the election of the Reichstag, the envoys of the governments convened at Berlin on the 15th of December to consider the draft of a constitution laid before it on that day by Count Bismarck. Three formal sessions, held on the 18th and the 28th of January and on the 7th of February, show how much must have been done beforehand in the way of private conference and exchange of views between the envoys and their governments. In the session of the 18th of January the crown of Prussia was authorized to represent the associated governments in their relations with the Reichstag, a function assigned to the King of Prussia in the proposed constitution. Accordingly, the work of the envoys now only awaiting the ratification of their governments, the King, by a patent of the 12th of February, 1867, the day following the general elections, summoned the Reichstag to meet in Berlin on

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the 24th of February, and on that day he laid before it in the name of the associated governments the draft of the constitution which they had adopted.

Immediately upon the close of the deliberations of the Reichstag, which covered a period of two months, the constitution as amended was adopted by the assembly of envoys, whereupon it was submitted by the governments to the legislatures of their several states and approved by the latter in the form prescribed for constitutional amendments in each state. The constitution thus adopted should have been promulgated either by the associated governments or by the governments and the Reichstag jointly. It was, as Binding points out, an anomaly that a national constitution should be promulgated by state governments. Strangely, however, neither the manner of promulgation nor the question when the new constitution should go into effect, had received any attention from what we may be justified in calling the new federal authorities. This omission was supplied by the state governments which promulgated the constitution, through the insertion of an identical provision that on the 1st of July, 1867, it should go into effect in the promulgating state. Ratification by state legislatures and promulgation on state authority are facts to which Seydel appeals as proof that the constitution is not a federal law but an identical law of the several states. Binding holds that the state patents issued by the state governments are incorrect in form, but that in principle they rest on the authority of the associated governments and of the Reichstag.

II.

This sketch of the history of the establishment of the North German Confederation prepares the way for an examination of the theories which in Germany the facts have been made to support. Among them the American student will at once recognize old acquaintances in a new garb. Seydel is a disciple of Calhoun, whose principles he applies to the German Empire. It was the merit of Calhoun, — a merit which makes his writings invaluable to the student of public law, — that

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starting from premises that were generally accepted he deduced from them with inexorable logic their ultimate consequences, and left no other choice open than the abandonment of the premises or the acceptance of his conclusions. Like Calhoun, Seydel holds that the doctrine of a division of sovereignty is in contradiction with the nature of the state. Sovereignty being indivisible and the states sovereign, it follows that the empire is not a state at all, but is only an international relation between sovereign states. These states concluded the August treaty for the joint regulation of common interests; and the constitution is hence an identical law of the several states, enacted in order to give effect on state authority to the stipulations of the treaty. The contents of the treaty and of the constitution are identical, the object of the latter being to enforce within state limits the provisions of the international agreement.

These arguments are of value because of the light they throw upon the origin of a federal state. Starting from the premise, at that time generally admitted, that the federal government had been formed by the states, Calhoun convincingly showed that the Union can be nothing more than a league of states, and that its executive, legislature and judiciary are organs, not of a federal state, but of the confederated states. Seydel, following Calhoun, holds that the empire is not a state, because it is founded upon treaties. Admit the premise and the conclusion follows irresistibly; for a treaty, which is an agreement between sovereign states, cannot be a fundamental law binding alike the people and the states. Every treaty presupposes the equality of the contracting parties, and the obligations which it creates are assumed, not imposed. No sovereign state, however powerful, can give law to another sovereign state, however slender the latter's resources. It lies in the nature of sovereignty that no obligation can be imposed upon it by any earthly power. Whatever obligations rest upon it are assumed, and derive their binding force not from the will of another but from its own will. If the constitution is not a law imposed on the states by an authority having the right to command their obedience, then it rests upon their joint will, and a violation of its

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provisions on their part is nothing more than a breach of the contract into which they have entered.

Moreover, treaty, inasmuch as it is the form which international relations necessarily take, must always remain treaty, and cannot be transmuted into fundamental law. States cannot divest themselves of their sovereignty in behalf of a state of their own creation. The view that has found large acceptance in America, that the states created the Union by bestowing upon it certain of their powers while retaining the rest, converts a federal state into a mere aggregate of the states that compose it, and its will into the joint will of its members. All relations between states must be on the basis of treaty. Thirteen states may reach an agreement, but after the agreement they are still thirteen. It is impossible in this way to pass from the coexistence of thirteen to one. Thirteen wills cannot concur to form a will which shall not be their joint will, but a new will imposing upon them its authority. The example of artificial persons from the domain of private law is not to the point; for it is the law of the state which establishes corporations and clothes them with whatever powers they possess. Binding points out that a treaty effects, not a union of two wills, but an agreement between them, and that the wills of the contracting parties have different contents and are directed toward different subjects, the obligations assumed by one being an equivalent for those assumed by the other.

Neither the August treaty nor the treaties concluded at Versailles in November of 1870 between the states south of the Main and the North German Confederation are in conflict with this view. By the former, the states agreed upon a method of calling into existence the organs of the nation which in organizing itself as a state was to subject them to its sway. To the authorities that were in sole possession of the field naturally fell the initiative in the work of political reorganization; but to hold that the states founded the North German Confederation is to overlook the nation of which that confederation was but the political organization. Of the treaties concluded at Versailles that with Bavaria has most interest, because of the

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weighty concessions made to that state in order to secure its entrance into the confederation. Article II contained the constitution amended so as to make it acceptable to Bavaria. The adoption of the proposed amendments by Federal Council and Reichstag took the form of ratification of the treaty. But this irregularity in form does not change the fact that the North German Confederation revised its constitution upon its own authority. Otherwise the constitution as contained in the treaties or appended to them, and the constitution after the redaction which was shortly undertaken by Federal Council and Reichstag to perfect its form, would rest upon different foundations. Not only, however, was the constitution not formed by treaty, but the entrance of the states into the confederation in fulfilment of the treaties was not in strictness state action at all, but rather the acceptance of the authority of the confederation by a people who had outgrown state limitations and who felt themselves to be part of the German nation.

There can therefore be nothing in common between what is a form of state action and what must lie outside of the sphere of state action, between a treaty by which a state enters into relation with other states and the process by which a nation, which is something altogether different from the aggregate of the state populations, organizes itself as a state. Decay and growth go on side by side in political society as elsewhere. Old institutions disappear or are transformed, and new forms are evolved to meet new needs and conditions. A state in this way undergoes constant renovation and improvement. But it is a much more serious matter when the state itself becomes antiquated and loses its hold on the allegiance of its subjects. History furnishes a good many examples of this alienation. By the middle of the century, both in Italy and in Germany, the populations of the states had already been fused into a nation. In such a case the form survives after the spirit has departed. How can we hold that a federal state is created by states which have already been undermined by forces working from beneath, unless indeed we believe that their power to create increases in proportion to their decline? The new polit-

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ical system must be created by the forces that have undermined the old. When we speak of the entrance of the states into the German Confederation or the American Union, we give an erroneous impression by using words which do not correctly describe what took place. It was natural that such terms should be employed, especially at a time when the nature of the change was not as fully understood as it has come to be since. Moreover, nothing is more common than to retain accustomed forms of expression while attaching to them new meaning. The German Confederation was a league, but the North German Confederation which succeeded it was a state. This latter confederation was not formed by the entrance into it of a number of states. The sources of its authority lie deeper than the states: they must be sought in that upheaval by which a nation was formed and, when formed, gave itself political organization. That a number of states, themselves undermined, should create an authority which, in issuing from their hands, subjects them to its sway, is a thing as impossible as the squaring of a circle.

The contract theory of the origin of the state, which found general acceptance throughout the last century, has since then been entirely discredited. As a political being man is born a member of political society and subject to its authority. The compact made upon the *Mayflower* might determine the form of organization, but could not bring into existence a political society which was already there, and which as such had jurisdiction over its members. The state is the necessary result of social relations and forces. To derive its authority from the consent of its members is to legalize anarchy. Public opinion is not the mere sum of individual judgments, but rather the result of an organic process, in the course of which individual views endlessly modify one another. Society brings into existence new forces and relations, and hence is not the mere aggregate of its members. In like manner the state, with its forces and functions, its natural superiorities and inferiorities, is not a simple sum in addition. Why should we be willing to admit this proposition when applied to England or France, and then

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deny it when applied to the United States or the German Empire? How can we accord to states the power to call a state into existence, when we deny the power to individuals? Why should a compact work more effectually in the one case than in the other? In truth it has no such working. It can bring into existence a league whose will is the will of its members of which it is itself the aggregate. But a state owes its birth to great historical forces which undermine the existing order and effect a political reorganization.

In his well-known work on the public law of the German Empire,[1] Laband holds, in opposition to Seydel, that the empire is not a league but a state, and moreover, since sovereignty is indivisible, that the empire alone is sovereign. As a state it cannot rest on a treaty, for a treaty creates only international rights and obligations. The parties to the August treaty "do not found a confederation, but pledge themselves to found a confederation; they agree not on a constitution, but on a method by which a constitution is to be established." Hence the North German Confederation did not come into existence on the 18th of August, 1866, but on the 1st of July, 1867, when it was founded by the states in fulfilment of treaty stipulations.

In considering these views the question at once arises: What is gained by denying that the August treaty was the foundation of the confederation, and then asserting that the confederation was founded by the states in fulfilment of that treaty? The distinction between a treaty and an act done in fulfilment of a treaty is of no value unless the act is to be performed within the jurisdiction of the state. In that case it is an act of sovereignty; but authority can be exercised outside of state limits only with the consent of the states interested. Since a state is a sovereign only within its own boundaries, state action beyond state limits must necessarily be upon the basis of treaty. The reason why a state cannot rest upon treaty is that a treaty is the form taken by international co-operation. But if a state co-operates with other states to form a federal state, what is this but international co-operation and the exercise of state authority

[1] Laband, Das Staatsrecht des Deutschen Reiches.

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beyond state boundaries? Seydel's position here is incontrovertible. Holding that acts of the empire are acts done in fulfilment of treaty, he infers that they rest ultimately on state authority. The founding of the empire was no doubt an act, but it was an act performed outside of the existing order and hence revolutionary in its character. An act subverting the existing political order cannot be an act of the states, for they are the political order that is to be overturned. Along this road it is impossible to get beyond a league of sovereign states; and indeed the empire, as Laband constructs it, is a corporation of states whose subjects owe allegiance to the empire only through the states, which alone are its members. This is Calhoun's doctrine of federal citizenship through state mediation.

From what has been said it is evident that Laband seeks to establish legal continuity between the old order and the new. While denying that the August treaty is the legal foundation of the North German Confederation, he yet holds that it is its international foundation. In the proceedings of governments and Reichstag he sees nothing but the steps taken by the states in fulfilment of treaty to draw up a constitution. The states are preparing to found such a federal state as the constitution describes; but until they actually call it into existence and endow it with its fundamental law, the constitution has no more authority than have the resolutions of a public meeting. In harmony with this line of thought is Laband's assertion that by their ratifications the legislatures empowered the governments to proceed to the establishment of the North German Confederation with the constitution which had been drawn up. The act by which the states founded the confederation Laband characterizes as a *Rechtshandlung*, or an act founded in law, although it is difficult to see how an act performed beyond state limits can derive its qualification as legal from state legislation.

All attempts to find a juristic explanation of the origin of a state are doomed to failure; for the birth of a state, however peaceably it makes its advent, is a revolution. To Jellinek belongs the credit of having shown that this is as true of a federal

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state as of a simple state.[1] Since the existing legal order rests on the authority of the state, it cannot be made use of to explain the existence of the state itself. But the states are part of the political order of the federal state, for they have no existence except as its members. They were in possession of the field before it, but the nation in giving itself political organization reduced them to a subordinate position. Jellinek rejects the traditional doctrine of divided sovereignty and logically holds that all the powers of government belong to the federal state, which, however, in assigning some of these powers to the organs which it has in common with every simple state, leaves the rest to the states, now become its members.

The confusion that results from qualifying as legal, proceedings that are revolutionary, is seen in our own history. The establishment of the Union was a work of political reorganization undertaken by a people which had outgrown a system of small commonwealths and had become conscious of nationality. In undertaking this work the nation made use of the means that were at hand, and these were such as the existing political system offered. The Philadelphia Convention was made up of delegates from the states, and the constitution, when adopted, was submitted to the people as then politically organized. But to infer the particularistic character of the constitution from the particularistic character of the organs which the nation necessarily employed in ordaining it, is to confound the river with the channel through which it flows. This is the error into which Laband falls. In the deliberations and decisions of the assembly of envoys and of the Reichstag he sees only the steps taken by the states in fulfilment of treaty, to frame the constitution with which they are to endow the new state when they shall call it into existence. The national character of the Reichstag might have suggested the nation which was making use of both governments and Reichstag in ordaining its constitution. But the governments in taking counsel of the nation were, according to Laband, merely carrying out the August treaty.

[1] Jellinek, Staatenverbindungen.

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In what Laband regards as the mere fulfilment of treaty, Binding sees the emergence of a new authority.[1] The formation of the North German Confederation must, he declares, be *extra et supra legem*. The proceedings of the governments and the Reichstag are a creative process by which the elements that are to form the new state co-operate in ordaining new legal relations. But in ordaining the constitution the assembly of envoys and the Reichstag did not act as organs of the North German Confederation, for that was not founded until the 1st of the following July. Much less did they act as organs of the states, for a federal constitution cannot be state legislation. It was their moral weight in Germany which qualified them to create a new system of public law. In ratifying a constitution which was to modify on its own authority the law of the states, the state legislatures relinquished rights which they had in the existing political order. But although the constitution was already law, it had not yet gone into effect. When the governments and people, upon the appointed day, took the positions assigned them in the new system, they gave effect to the constitution, and in so doing they created the North German Confederation.

For the new political order Binding finds a commanding authority, but that authority is not, as in Jellinek, the state itself. This inversion of the logical relation between a state and its constitution is not without serious consequences, for Binding finds himself compelled to make to Seydel the admission that a constitution may be a compact. Indeed, he expresses the opinion that in case of absolute monarchies, where the consent of the people would not be necessary, a federal state may be formed by treaty. But where states with constitutional governments undertake to form a federal state the consent of the nation is necessary, and a treaty between states which should require the ratification of the entire nation is unthinkable. But does not this remark suggest where the real difficulty lies? Is it conceivable that the parties co-operating in the formation of a constitution should act in different capacities, the Reichstag

[1] In the suggestive pamphlet already mentioned.

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in behalf of the nation and the governments in behalf of the states? Are they not both organs of a state which is already moving and which gives its first sign of life in ordaining its constitution? If this be true, then what Binding calls agreement or compact between the governments and the Reichstag is no more compact than is a vote of the German Federal Council or the concurrent vote of Federal Council and Reichstag. It is not an agreement between the parties that are to form the new state, but co-operation between the organs which the new state makes use of in ordaining its fundamental law.

Agreement then must be between the organs which a nation employs and not between individuals or states; for the nation is not a numerical aggregate but the result of an organic process. In Germany national forces had been gradually gathering strength until at last they became irresistible. By breaking down state barriers for economic purposes the Customs Union had demonstrated the advantages of national unity. Dangers from abroad showed the necessity of the concentration of Germany's military resources. The increasing intercourse between the states pleaded for unification of the law and for a uniform judicial administration. Into this national movement both people and governments were drawn, the latter for the most part reluctantly and out of deference to public opinion and fear of Prussia. But whether spontaneously or under pressure, they espoused the cause of the nation, hoping to find in the position they gained on the national arena compensation for the diminution of power at home. The Prussian government had long stood forth as the champion of German interests, and the position that was accorded to it in the new system was a reward for services rendered to the national cause. In the nation which had outgrown the system of small states and was bent on establishing national institutions it was the natural leader, and its ascendency assured the co-operation of the other governments. What could be more natural than that associated governments and Reichstag should alike serve as organs of the nation, now that it was undertaking the work of political reorganization? As in local affairs the governments were the leaders, so the

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associated governments took the lead in national affairs; and as in the states the governments enjoyed the co-operation of legislatures, so on the national arena the associated governments summoned to their co-operation a North German Reichstag. In summoning this Reichstag and drawing up a constitution for its approval, they were no less organs of the nation than was the body which they summoned. The new authorities are already pointed out before the work begins, and they fall naturally into the positions that seem by right to belong to them. The organs which the nation uses in establishing its constitution and which, as Jellinek remarks, serve as a provisional government, usually differ in character from those which the constitution provides. Such was the case in this country, where the nation had to make use of a convention made up of delegations from the states. But in Germany the forms of provisional and of permanent organization are almost identical. Federal Council, Reichstag and King of Prussia already take the positions which they occupy to this day.

This close resemblance between the provisional and permanent form of organization is in a high degree instructive. It may be difficult to see in the Philadelphia Convention an organ of the American nation, but there is no such difficulty in the case before us. Associated governments and Reichstag were peculiarly fitted to serve as organs of the nation, and indeed they have served in that capacity ever since. But if they were organs of the nation, they were as such organs of the state; for what is the state but the nation politically organized? Already in its provisional organization the state is emerging into the light and speaking with authoritative voice. In taking political form and organization the nation becomes the state, and even the acts by which it establishes its permanent organization rest on state authority. Otherwise whence do they derive their sanction? An understanding between the governments is a treaty between sovereign states. The discussions of the Reichstag except as organ of a state in process of formation have no more authority than the resolutions of a public meeting. Governments and Reichstag could ordain a constitution only as organs of the

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nation; but if they formulate the will of the nation, the state is already in existence, although but provisionally organized. For the criterion by which to judge of the presence of the state is not the form of its organization, whether provisional or permanent, but the existence of a political authority. The wish of the nation, hitherto fruitlessly expressed, has been transformed into the will of the state. This will is already law, although as yet it has not gone into effect. The authority of the states remains still undiminished. But to their sway a term has been set. Already they are falling under the shadow of a greater state, which is the embodiment of national forces and which makes use of them in effecting its organization and assigns them permanent places in its political system.

RICHARD HUDSON.

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THE PRESENT CONDITION OF POLITICAL ECONOMY IN ITALY.

I.

I DO not undertake in this article to make a critical study of the present condition of economic science in Italy, nor to delineate completely its various tendencies in their gradual development. Such a purpose would require a position of authority which I am certainly not justified in assuming. My aim is merely to furnish the American reader with a general view of the movement of economic thought in Italy during the last fifteen years, to acquaint him with the scientific methods in vogue, and more especially to call his attention to the principal works of the best economists Italy has brought forth in that time.

It cannot be denied that in the past few years there has been in our country a remarkable development of the social sciences, and particularly of political economy. This fact is attested, not only by the large number of students devoted to this latter science, but also by the volume of Italian literature on the subject, which, although surely not altogether of the highest quality, still presents a respectable array of good works in the various branches of the science. This literature deserves indeed to be somewhat better known in foreign countries than is actually the case. It may be that the knowledge of the Italian language is not very widespread; perhaps also Italy has failed as yet to assert herself in scientific contests, owing to her tardy entrance in the lists with great nations.

It cannot be said that there exists an Italian school of political economy, or that Italian economists follow original methods in their research. While not without representatives among the originators of the science, Italy has in more recent times fallen under the influence successively of English, of French and of German ideas, and to-day some of her economists are followers of the so-called Austrian school. However, foreign

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theories have rarely been accepted *in toto;* often they have been remodelled and greatly perfected; oftener yet, their extreme doctrines have been softened down in a spirit which tends to become a little eclectic — a spirit which seems to be in a measure characteristic of Italian thought.

From this undeniable foreign influence on economic studies in Italy no harmful results have come during the period which I propose to consider. On the contrary, a wide acquaintance with the researches of others has facilitated the studies of some strong thinkers and enabled them to make valuable original contributions to science. Various factors have been at work in this development of economic studies in our country. These may be summed up in order of importance as follows: (1) the rapid intellectual and economic progress which followed the attainment of independence and of national unity; (2) the industrial development, still rather imperfect, but beginning already to manifest to the country its natural results, *e.g.* the friction and antagonism so characteristic of the modern social order; (3) the rise and increase of credit and insurance companies, which have attracted a great deal of attention and become the objects of careful investigation; (4) the economic and financial questions raised by the creation of a new political order, *e.g.* the regulation of credit, of money and legal tender, of railroads, of the tariff, the public debt, taxation, *etc.;* (5) the crisis and general discontent, especially in these last years, in industry and agriculture — facts which have attracted universal attention and given rise to various inquiries; (6) and finally, the development and regulation of governmental services and an extensive array of official statistics, which have yielded to students fruitful materials for further study. To this far from exhaustive list of factors found in the general conditions of the country, should be added others which may be called "scientific," and which have exerted a most potent influence. Here belong the impulse given to the science by the university chairs of political economy, distributed throughout the whole kingdom; the introduction of economic instruction in technical schools; the recent establishment, in

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the universities, of chairs for the science of finance, a subject which had heretofore met with a very scanty theoretical development. But above all, honor is due to a few economists of repute, who by their public teachings and private studies have given a most effective impulse to the science. Foremost among these, stands Luigi Cossa, who has been teaching for more than thirty years at the University of Pavia. There he has founded a true seminary of political economy, already possessed of honorable traditions, and from which have graduated the greater number of the younger Italian economists. I call it a seminary and not a school, because it devotes itself to no exclusive method, and aims solely at scientific research, utilizing whatever is best in every line of thought. Cossa himself is a learned economist and a profound thinker. He is well known as the author of the *Elementi di Economia e di Finanza*, and of a guide (*Guida*) to the study of political economy, which has met with a cordial reception even in foreign countries, and has been translated into different languages, including English. He is the untiring promoter of historical research relating to political economy in Italy. Under his inspiration his students have produced many special monographs of great value, which now await only his synthetic touches in order to constitute a complete history of political economy in Italy. Along with Cossa's name ranks that of another veteran teacher of economic science, Senator Angelo Messadaglia, professor at the University of Rome. His disciples have been many, and to him are due most valuable additions to the theories of money, credit, population and the taxation of land. His works are much appreciated in Italy, and their exceptional importance to science makes it a matter of regret that they are not better known in other lands.

Again, I must not omit the name of Senator Gerolamo Boccardo, who stands out in his more recent writings as an expounder of the new historical and sociological tendency. As editor of the *Biblioteca dell' Economista*, he has done much to spread throughout Italy a knowledge of the more recent works of foreign, and especially of German, economists. Neither can

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I pass over Luigi Luzzatti, professor, deputy, and, at the present time, finance minister; advocate of the popular banks, defender of the co-operative and provident movement; a learned and brilliant writer on economics, social science and finance. Other younger economists, who have already made a name for themselves, I shall have occasion to mention later on.

II.

The renewed interest and fresh activity in economic studies in Italy dates from 1870. To convey any clear idea of the origin and nature of this movement, it is necessary to describe the long and stubborn controversy which was carried on in the reviews, at conventions and in various publications in 1874 and the following years.

Prior to 1870 the dominant influence in Italian economics was that of the distinguished Sicilian economist, Francesco Ferrara, who is still living. To Ferrara's strong and original mind the science owes important contributions, especially in the theory of value. His views on this subject are set forth chiefly in the prefaces to the first two series of the *Biblioteca dell' Economista*, of which he was editor until 1870. These prefaces have lately been brought together and published in two volumes (Torino, Unione, 1889).[1] His other writings are numerous but widely scattered. Those on statistics are to be found in the *Annali di Statistica* (Rome, 1890). Cossa characterizes Ferrara's influence with a master-hand:

> It had many-sided usefulness; but it would have availed more if, along with many true sayings, he had not helped to spread Carey's and Bastiat's paradoxes, especially in reference to value and income. Neither should he have believed himself able to solve all problems of economic legislation by the simple negative principle of *laisser faire*, especially when he assumed an interpretation and application directly at variance with the ideas of Smith himself.[2]

The majority of Italian economists had experienced in a certain way the charm of these theories, which were brilliantly and

[1] *Cf.* POLITICAL SCIENCE QUARTERLY for March, 1891, p. 181.

[2] Guida allo Studio dell' Economia Politica (Milan, Hoepli, 1878), 2d ed. p. 249.

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ably expounded and carried out to their last logical consequences. Italian economic literature bore little fruit, however, from 1849 on, outside of the works of Messedaglia, mentioned above, and of Boccardo, Jacini, Scialoja, Arrivabene, Minghetti and a very few others. But after 1870 a revival began, due to a number of causes, but particularly to the influence exerted by the modern German economists. This influence was manifested in the works of Nazzani,[1] in which the classical ideas of the English school were felicitously combined with the best results of the recent historical researches of Roscher, Schäffle and Wagner; in Lampertico's *Economia dei Popoli e degli Stati*, the first volume of which, published in 1874, contained a sober exposition of the conceptions of the German school; in Cossa's *Elementi* (1875), in which also the various tendencies were harmonized; and finally in Cusumano's work on the economic schools of Germany.[2] Cusumano came out as a decided and enthusiastic exponent of the German theories; and therein lies the difference between his work and the productions of former authors, who, while profiting by the results of recent investigations, had followed more temperate and eclectic methods.

These theories and their Italian advocates were met by Ferrara in 1874 with an outburst of fiery denunciation.[3] He opposed the principles of the historical school, as expounded by Roscher, Wagner, Schéel and Brentano; he accused the modern economists of a tendency toward socialism; he criticised severely the conception of social reforms as opposed to the old *laisser faire* of orthodoxy; he charged the new school with exaggerating the friction between capital and labor and with introducing a form of socialism which their hypocrisy made by far the most dangerous of all. Then he turned with bitter words against the Italians who had shown tendencies to embrace these fatal doctrines. He singled out more especially

[1] Sunto di Economia Politica, 1st ed. (1873), and Saggio sulla Rendita Fondiaria, 1st ed. (1872).

[2] Le Scuole Economiche della Germania in rapporto alla Questione Sociale (Naples, 1875); a collection of articles published during the two preceding years.

[3] *Nuova Antologia*, August, 1874.

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Cusumano, Cossa and Lampertico, and their younger disciples Toniolo and Montanari. He rebuked them for seeking to destroy liberty, for paving the way back to barbarism and preparing the immediate ruin of Italy.

These scornful words of the old champion of economic orthodoxy were calmly answered by Luigi Luzzatti.[1] He avowed his adherence to the new ideas, but he stated them moderately. He extolled the merits of the historical school, and the works of its German founders. The historical method, he said, by clearing up the past, had justified the present and prepared for the future. By elucidating the historical conception of the state, he defended professorial socialism against intemperate and reckless criticism. Without exaggerating the importance either of the historical method or of the principle of governmental interference, Luzzatti met the attacks of the liberals by pointing to the vast body of economic legislation in England, the birthplace of their creed. In a word, Luzzatti examined the question in a temperate and scientific way, avoiding extremes, adopting all the good results of recent studies without sharing in their exaggerations, and laying down the most profitable lines of research for future Italian economists. Again, in a later article, he defined more clearly this new eclectic method which was developing in Italy under the influence of German doctrines.

> Between the classical economists at one extreme and the socialistic iconoclasts at the other, there is to-day a mediator in the historical or inductive school. . . . Its adherents do not admit *a priori* either harmony or contradiction of interests. They investigate the world as it is, and not as it ought to be. . . . They admit liberty as a principle; they also put their faith in the energy of individual action. But they do not propose to construct economic romances on the presumption either of necessary harmony or necessary antagonism in human interests. They respect and uphold progress equally with liberty; and where compulsory social action, *i.e.* the action of the state, serves to prevent conflicts which liberty promotes and to procure benefits which liberty obstructs, they accept in their economic proceedings a directive action, *viz.* governmental interference.[2]

[1] *Nuova Antologia*, September, 1874.

[2] *Giornale degli Economisti*, September, 1875.

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But the controversy between the liberals and the followers of the new method of research was spreading and growing bitter. In concert with Lampertico and Scialoja, Luzzatti summoned a congress of economists at Milan in January, 1875. Later on he founded in Padua an "Association for the Advancement of Economic Studies" (*Associazione per il Progresso degli Studii Economici*). Ferrara and some of his followers protested against each of these movements and in general against their heterodox tendencies, and held in turn conferences and conventions in Florence at the "Adam Smith Club." Luzzatti, Forti and Favaro retaliated by founding an important review, the *Giornale degli Economisti*, published in Padua from 1875 to 1878, which carried out the programme outlined by Luzzatti in the words quoted above. Chief among its contributors were Lampertico, Boccardo, Cossa and the best among the younger economists, such as Ferraris, Ricca Salerno, Cognetti, Toniolo, Errera and Lo Savio. It was in this periodical that Forti, the editor, published the researches of Roscher and Wagner, in a series of articles on the history of political economy and on professorial socialism. Carlo Ferraris contributed important essays in administrative science, based upon wide study and showing full acquaintance with the German literature. Lo Savio investigated the function of the state. Lampertico answered the attack of Ferrara by a temperate defence of the inductive method and of a progressive science, not to be held in check by the limitations of *laisser faire*. I have mentioned only those writers whose arguments serve best to show the tendencies of the new movement. It was characteristic of these tendencies that the *Giornale* dwelt largely on matters pertaining to the working classes, child labor, profit-sharing and co-operation.

But gradually the controversy lost its original bitterness. An indication of this was the attempt made in 1878 by Minghetti, Lampertico, Luzzatti and others to revive in Rome the old *Società d'Economia Politica Italiana*, founded at Florence in 1865, and by conciliatory measures to convert it into an organization open to all schools, where all Italian economists might

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meet in friendly reunion. It may be said, however, that the victory belonged in great measure to the new movement, — though in more recent times there have appeared signs of a reaction toward the old abstract science. In this reaction another tendency is involved, of which I shall speak later on.

As I have already said, the victorious new method did not manifest itself in Italy with the harshness and all-absorbing tendency of the German school, but under a more temperate and eclectic form. The victory lay in the fact that few economists were any longer held in check by the barriers of economic liberalism or the absolute optimism of Ferrara. And even in those who still clung to the old school some tendency to compromise was to be noted. In the meanwhile, the majority of Italian economists kept on in scientific research, adhering more or less to the new methods, adopting German thought with various degrees of enthusiasm, often attempting to reconcile contrary tendencies, but in every case rebelling against that barren immobility in which orthodox science had wished to bind itself.

III.

I shall now sketch briefly the various tendencies observable to-day in Italian economics, beginning with the so-called liberalism. The preceding pages, I think, have given the reader a sufficiently accurate idea of Italian liberalism. It is not an exact reflection of Smith's theories, but is connected rather with the French optimistic school. The line of thought marked out by Ferrara, the prince of the Italian liberals, has great affinity with that of Bastiat, Leroy Beaulieu and de Molinari. It has already been said that a few liberal ideas are common property of nearly all economic schools: they have taken root in the English classical school, and are accepted in great part by Italian economists. But there are very few of the latter who now tolerate that absolute liberalism which prevailed a while ago. Thus, for example, in matters pertaining to commercial policy, all or nearly all Italian economists favor free trade, — at least in general theory, for in practice it is easy enough to adopt some sort of a compromise.

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And there are very few — even apart from the decided supporters of the new theories — who have not shown some tendency to compromise. This is true in questions of economic and social policy and of governmental interference as well as in questions of method and of the importance to be assigned to economic laws. In respect to other questions most Italian economists are followers of Ricardo, Malthus, Cairnes, *etc.*, rather than of the optimistic liberals.

I have already spoken of Ferrara, and called attention to his works and to his great merits. His followers must now be considered. Among his disciples of greatest repute may be named the following: Martello, professor at the University of Bologna, author of a *Storia dell' Internazionale*[1] and of a volume of monographs on money;[2] Fontanelli, who died last year, the author of a study on strikes, — the legitimacy of which he denied, — of a popular manual of political economy, and of other publications all redolent of liberalism and of absolute optimism; Bertolini, who has recently translated Rae's *Contemporary Socialism*, prefacing it with an important study on socialism in Italy;[3] Berardi, who has published a book entitled *Funzioni del Governo;*[4] in which the question of governmental interference is treated at great length from a liberal point of view; Pareto, author of some articles, chiefly in the *Journal des Économistes* of Paris; and, finally, Pantaleoni, an economist of great talent and erudition, of whom I shall have occasion to speak later in connection with the most recent tendency which has manifested itself in Italian economic studies.

To-day the last stronghold of orthodoxy is in Florence, where liberalism has always had and still has followers. In this place, a good economic periodical, the *Economista*, chiefly devoted to practical questions, strenuously upholds old theories through

[1] Padua, Salmin, 1873.

[2] La Moneta (Florence, Le Monnier, 1882). In this work the author displays great *vis polemica*, and, under the head of polymetallism, propounds theories looking to a most complete freedom in monetary affairs. The volume contains an important introduction by Ferrara.

[3] Florence, Le Monnier, 1889.

[4] Florence, Le Monnier, 1887.

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Franco, Dalla Volta and De Johannis, its editors. The tendency of the two last-named is to exceed the narrow limits of their school: this is due to the breadth of their studies, and to the benefits they have derived from modern investigations. De Johannis has even gone back again into positivism.

It is not possible in Italy to speak of a protectionist school in contrast to the liberal school; for protectionism has hardly any representative in Italian economic science. But mention should be made of Senator Alessandro Rossi, who deserves much credit on account of the impulse he has given to industry and to institutions for the benefit of the working classes in Italy, and who for a long time has laid stress on the necessity of adopting a tariff policy of a more decidedly protective nature, and neglects no occasion to proclaim his ideas energetically in Parliament and elsewhere. It is also necessary to speak of Egisto Rossi, who a few years ago travelled extensively in the United States, and made an exhaustive study of its agricultural and industrial conditions. He published in a most interesting book[1] the results of these studies and urged the need of strongly protective tariffs for the defence of Italian agriculture against foreign competition.

It cannot be denied that the ideas of protectionists have made headway in Italy, and have gained ground among farmers and business men. The chambers of commerce have repeatedly taken up the cause, and protective tendencies have also found an echo in Parliament, resulting in a partially protective tariff both for agricultural products and for manufactured goods. These facts go to prove that Italy also has felt the influence of that protectionist reaction which has so conspicuously manifested itself in Europe and the United States; but they do not affect in any way the theoretical side of the question. Upon the students of economic science in Italy, the doctrines of the protectionists have as yet made no impression.[2]

[1] Gli Stati Uniti e la Concorrenza Americana (Florence, Barbera, 1884).

[2] Thus, to cite an instance which may tell in the United States, take the case of Deputy Ellena, who is an expert in tariff matters, and was the chief author of the last Italian tariff. He advocated protection, but claimed only that there was a partial need of it in practice. He did not defend it in theory as a general tendency.

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IV.

It is much more difficult to speak with any exactness of those schools which, with Gide,[1] we shall call the "new schools." The eminent French economist says, very cleverly, that it is much easier to define what they are not than what they are; because they embrace divers methods, and harbor all those economists — and they are in the majority — who do not belong either to the school of the liberals, or to pure socialism, or to the Catholic school. It is the more difficult to speak of the new schools in Italy, because Gide's remark of the school in general — that "it has nearly as many shades as it contains disciples" — is particularly applicable to Italian economists.

A few words, first, regarding the various new tendencies manifest in Italy, according to which our economists may be more or less roughly grouped. We may distinguish the following: the sociological tendency; that new historical tendency which has yielded a rich harvest of studies on the history of economic science in Italy, and also a few good studies in economic history; the various movements, more or less marked, in the direction of governmental interference; the numerous eclectics, with whom German ideas have modified orthodox English theories either as regards method or as regards doctrine; the pure socialists; and finally the followers of the new Austrian school, which in a comparatively short time has made a number of recruits among Italian economists.

The sociological tendency in economic science has its chief representative in Germany in the person of Schäffle. It has some disciples in other countries, — for example, Ingram in England and Denis in Belgium, — but in Italy its followers are few. There is evidently a close connection between the sociological and the historical schools. They have in common, first,

Again, by a singular paradox, Senator Rossi, to whom one's thoughts revert instantly at the very suggestion of protection in Italy, is known as a rabid adversary of factory laws; he energetically opposed their adoption in Italy. One is justified in remarking that sometimes extremes do meet.

[1] *Cf.* L'École Nouvelle, Conférence (Geneva, Richter, 1890).

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a method in accordance with which scientific research is based on a rigorous objective study of facts in their history and in their contemporary manifestation, in their relation to their environment; and second, they have a common conception of social and economic laws, which are regarded as relative and historical. But the sociological school is distinguished by a broader and more philosophical conception of economic phenomena, the study of which, it holds, is intimately connected not only with that of all social phenomena, but also with that of the organic structure and internal order of society. It is thus in accord with the synthetic tendencies of modern sociology and the theory of evolution. The influence of this line of study has been strongly felt by Boccardo, — mentioned above as ranking high among Italian economists. He has taken up the new conceptions with a remarkable power of assimilation and breadth of view, and has completely recast in its latest editions his old *Trattato di Economia Politica*, resolutely defending the positive method and emphasizing the theories of modern sociology. He has also expounded and elucidated these theories in a masterly way, from the economic point of view, in his fine prefaces to some of the volumes in the third series of the *Biblioteca dell' Economista.*

Following the same tendency, Cognetti de Martiis, professor at the University of Turin, has furnished us with works notable for originality and breadth of scholarship — works which do honor to Italian science. In his *Forme Primitive della Evoluzione Economica*,[1] Cognetti enters a field which had been left almost wholly unexplored by economists, and employs in his researches the criteria of sociology and a method that is strictly inductive. He studies the natural development of economic functions, primarily, among the lower animals, and especially in the organization of the bee-hive and the ant-hill. He examines the characteristics of these primitive economic forms, and shows what advantages the economist can derive therefrom, and how he can find in these forms suggestions of human economic institutions. Then the author studies the economic

[1] Turin, Loescher, 1881.

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life of primitive peoples in the savages of the present day, and examines in their case the two functions of production and exchange. By a careful scrutiny of the various savage tribes, he traces clearly the first outlines of the human economic function and the development of the principal social institutions. This line of study had no precedent either in Italy or in the economic literature of other countries. In the interest of economic science the author has exploited the vast material accumulated by naturalists, by students of anthropology and by travellers, and has opened the way for fruitful observations on the origin of economic institutions. This study is followed by an historical part, no less important and erudite, treating of the economic life of the most ancient peoples, — Egyptians, Chinese, Aryans, Mexicans, Phœnicians. Finally comes a felicitous synthesis in which the author takes a firm stand on the facts he has collected, and presents the primary characteristics of economic phenomena and the laws of their early evolution.

Of still greater depth and originality is another work of Cognetti, recently published — *Socialismo Antico*.[1] As in his preceding work he had studied the primordial phases of economic life, he sketches here the primitive forms of socialism, — that "economic Utopia" which springs from "economic reality" and advances step by step with it. For the primitive forms of economy Cognetti had found fresh material in natural science and archæology; in his new investigations he makes similar discoveries in literature, mythology, philology and history. He gives us an admirable scientific reconstruction of the "legend of socialism," which we encounter among so many ancient peoples. This legend has a real economic basis; suggesting, as it does, to the sufferers of olden times a world of happiness where comfort was to be had without effort, in a general fraternity and in perfect peace and equality, it reminds one of that communism of property which existed in the first periods in the life of nations. The study which the author has made of this legend among so many tribes and under so many forms will be a lasting monument of diligence and erudition.

[1] Turin, Bocca, 1889.

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The remaining two parts of the work deal with Oriental and Greek socialism. Here also the author moves from discovery to discovery, in a region nearly unexplored. I would call especial attention to his interesting researches on the school of Moh Tih, which disapproved egoism and proclaimed the principle of mutual love and the absolute equality of all men; also to his very original chapter on Wang An Shih,[1] the minister who governed China for eight years in the eleventh century, and who introduced into the social organization sweeping reforms involving an extraordinary amount of governmental interference. Commerce and prices were regulated; the right to divide up the land among families was reasserted by the state; free loans were made to husbandmen. The story of this socialistic reformer and of his final overthrow, illustrated by an able description of the historical and economic surroundings of the field of action, would suffice by itself to stamp the book with the mark of peculiar originality. No less important are the researches of Cognetti in Greek socialism: although this field is somewhat less unexplored, he has been able to bring out new and valuable points.

These two works of Cognetti de Martiis, for the possession of which other countries may well envy Italy, prove the fruitfulness of the sociological and positive method, as applied with strict scientific exactness to the study of social economy.

Of a sociological turn are also the works of Vanni on the theory of population; of Lo Savio, of Schiattarella, of Zorli, on economy and on finance; and, as regards method, the writings of De Johannis, whom I have named already, on *Teoria del Valore*, and *Preminenza dei Fenomeni Economici.*

In order to complete the list of ardent and sincere followers of this line of research, the author of this paper is obliged to enroll his own name and to mention one of his youthful studies, the *Evoluzione del Lavoro.*[2] His order and system differ some-

[1] Cognetti writes these names *Mih Teih* and *Uang Ngan Shi.* The transliteration here adopted was kindly furnished by the Chinese Legation at Washington. — EDS.

[2] Turin, Unione Tipografica, 1883.

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what from Cognetti's. He sketches the primitive forms of labor, starting at their points of contact with the function of nourishment in organic structures; then, after studying the economic function of labor in the societies of the lower animals, among prehistoric men and among the savage tribes of to-day, he endeavors at last to lay down a few general laws. He would also mention other and later works of his, especially on co-operation; such as *La Cooperazione in Inghilterra*,[1] *La Cooperazione in Italia*,[2] *Le Società Cooperative di Produzione*.[3] In these works, and more particularly in the last, the author has employed the sociological and historical method. He has studied the forms of co-operation in different countries, and, on the basis of strictly inductive observation, he has sought to establish the general lines of economic theory as regards these very important social forms.

The sociological school has been bitterly assailed by Lampertico, not on account of its method, but because of its philosophical system. He himself adheres in good measure to the German historical and social school, and in his works he assigns chief importance to the study of facts; but he does not accept the theories of evolution and does not admit the scientific consistency of the great modern structure of sociology.

V.

The historical movement may be considered from two different points of view, *viz.* the works to which it has given rise, and the economists who have more or less adhered to either its theory or its method. Let us first pass in review the works of a distinctly historical character produced in Italy under its influence.

With the exception of Germany, I know of no country where studies in economic history are so plentiful as in Italy. This abundance is due in great measure to the continuous incentive

[1] Milan, Dumolard, 1885. [2] Milan, Dumolard, 1886.
[3] Milan, Dumolard, 1889. Reviewed in the POLITICAL SCIENCE QUARTERLY, IV, 692.

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of Professor Cossa's seminary in Pavia. The greater part of the Italian studies treat of the history of economic science in Italy; but there is no lack of economic history proper. Without in any way slighting the former, I am inclined to prefer the latter as constituting to all appearances the best preparation for an economic theory. The works of the first class already furnish nearly complete materials for a history of political economy in Italy, and may be subdivided into two categories:[1] those that deal with the general history of economic science at particular periods, either in the whole of Italy or in some distinct region; and special monographs relating to an author, to a given institution or to a given locality.

Among writings of a general character, the following deserve special mention: Fornari's complete but lengthy work on the *Teorie Economiche nelle Provincie Napoletane dal Secolo XIII al 1830*,[2] containing a summary of the studies of all Neapolitan economists of any importance; the more compendious researches of Gobbi[3] on political economy in Italy during the sixteenth and seventeenth centuries, which gives a minute analysis of the works of the numerous economists and jurists of that period, — some of them very worthy of note, — followed by an important study of the characteristics of Italian economic theories during the same period; the equally important works of Supino[4] on the same subject; the *Storia dell' Economia Politica negli Stati della Repubblica Veneta*[5] in the sixteenth and seventeenth centuries, by Alberto Errera, remarkable both for its study of the literature and for its wealth in documents. Italian financial science has found in its turn an eminent historian in Professor Ricca Salerno, whose *Storia delle Dottrine Finanziarie in Italia*[6] is a true model of its kind.

[1] Be it borne in mind that I do not take in consideration the writings of the last few years; otherwise I should have to allude to the works of Pecchio, Cibrario, and more recently yet, of Albergo, *etc.*

[2] Milan, Hoepli, 1882–88, 2 volumes. This work is accurate, although perhaps too minute and somewhat unsatisfactory in its synthesis.

[3] L' Economia Politica negli Scrittori Italiani del Secolo XVI–XVII (Milan, Hoepli, 1889).

[4] La Scienza Economica in Italia nel Secolo XVI–XVII (Turin, Loescher 1888).

[5] Venice, 1877.

[6] Rome, 1881.

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Much more numerous and varied are the special monographs. Of those which treat of single authors I shall name the monographs of Lampertico on Ortes, that of Balletti on Scaruffi, and those of Fornari on Serra and De Santis. Among the studies relating to particular economic institutions as viewed by the old economists, we may mention the monograph of Alberti on the *Corporazioni negli Antichi Economisti Italiani*,[1] where Italian theories are compared and co-ordinated with those of foreign economists; that of Gobbi on the *Concorrenza Estera negli Antichi Economisti Italiani;*[2] that of Toniolo on the *Scolastica e l' Umanesimo in Toscana;* Loria's very important *Teoria del Valore negli Economisti Italiani;*[3] and among more recent essays on this same topic, Graziani's *Storia della Teoria del Valore in Italia*,[4] in which the development of this theory in Italy is considered in its relation to the changes which followed immediately in foreign theories, and Montanari's *Contributo alla Storia della Teoria del Valore*,[5] — a very accurate study, rounding off the entire investigation.

Coming finally to the studies on the history of economic facts, we find ourselves in presence of an assemblage of noteworthy writings, although rich veins of material have yet to be worked before a complete economic history of Italy can be written. Studies on guilds are abundant. Much light has been thrown on this important mediæval institution by the very carefully prepared monographs of Orlando, on the *Fratellanze Artigiane*, and of Supino, on the *Corporazioni di Arti e Mestieri;* and through the special studies of Cuturi, on the *Corporazioni del Comune Viterbo*, bringing out new points of view as regards the rural guilds; of Portioli, on the *Corporazioni a Mantova;* of Gaudenzi on the *Collegi delle Arti in Roma;* and of others whom it would take too long to enumerate. To the history of banks very important contributions have been made by Lattes in his study on the *Banche a Venezia dal Secolo XIII al XVIII*, and recently by Cusumano in his *Storia dei Banchi*

[1] Milan, Hoepli, 1887. Reviewed in the POLITICAL SCIENCE QUARTERLY, IV, 335.
[2] Milan, Hoepli, 1884.
[3] Bologna, Goragnani, 1882.
[4] Milan, Hoepli, 1889.
[5] *Ibid.*

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di Sicilia, the first volume of which, dealing with private banks, is just out. This work, the result of patient researches in archives, casts much light on the commercial life of Sicily in the middle ages, and presents new material for the history of credit and of certain economic institutions which had their beginnings in the practices of private banks.

But for lack of space, I might speak of other works of consequence in the field of economic history, such as that of Toniolo on the *Fattori Remoti della Potenza Economica di Firenze;* of Alessandro Lattes on the *Diritto Commerciale nella Legislazione Statutaria, etc.;* but these few indications may suffice to give an idea of the importance which studies of this kind have assumed in Italy.

VI.

It has already been said that although the German theories have had a great influence in Italy, they have there assumed a milder and more temperate character. Nothing that can properly be called a school of "state socialism" exists or has ever existed in Italy. Not that theories of the kind have not made headway among us, but they have lost a large part of their absolutism; and among the numerous Italian economists who, without being true state socialists, still lack that sacred horror of governmental interference which is proper to ultra-liberals, we find all shades of opinion, — from strong faith in the efficacy of the state, with a consequent tendency to widen the field of its economic and social action, to that liberalism which is tempered by historical and positive influences; which is unwilling absolutely to reject the intervention of the state in economic life, but attempts to restrict its action within the narrowest possible limits.

Among the economists who come nearest to state socialism, the name of greatest authority in Italy is that of Professor Carlo Francesco Ferraris, of the University of Padua, the author of notable studies on monetary questions, on statistics and on administrative science. He is an advocate of the historical and positive method in the study of economic phenomena. He is

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also a champion of social legislation, and inspired a recent bill for the compulsory insurance of workmen. This last question he has treated in a very remarkable study.[1]

In another field, great importance is attributed to state action by Augusto Mortara, in an original and remarkable work on the *Doveri delle Proprietà Fondiaria*.[2] The author starts from the idea that the justification of private property in land lies solely in the impulse thereby given to production. He maintains that the extreme liberty granted to landlords results in insufficient production; and he asserts the right of the state to prevent improper use and inadequate exploitation of land, and actively to promote its cultivation, by obliging the landlords to till it, to fertilize it, and to improve the methods of husbandry. He asserts also the right of the state to enforce the adoption of agrarian contracts that will safeguard the position of the tillers of the soil. These ideas meet with the approval of an eminent Italian economist, Loria, of whom I shall speak later.

Passing from these extremists without as yet entering the camp of the pure liberals (and noting only the most distinguished names), we come to Luzzatti, who admits the necessity of governmental intervention but witnesses regretfully its growth, apprehending that socialistic laws "à la Bismarck" may obstruct the development of individual enterprise, to which he would like to give the highest place;[3] and to the late Minghetti, who certainly could not be suspected of state socialism and was in the main a follower of English doctrines. It was he who proclaimed the historical character of the question of state interference, and admitted its legitimacy in the distribution of wealth in cases where individual interests do not coincide with collective interests, and where it is evident that private initiative and free association are not in position to subserve the general interest.[4]

[1] L' Assicurazione Obbligatoria per gli Infortuni del Lavoro (Rome, Botta, 1890).

[2] Rome, Botta, 1885.

[3] Among other masterly writings of Luzzatti, see Il Socialismo e le Questioni Sociali dinanzi ai Parlamenti d' Europa. *Nuova Antologia*, January and February, 1883.

[4] *Cf.* Il Cittadino e lo Stato, *Nuova Antologia*, November 1, 1885.

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This same criterion, *viz.* necessity, has been adopted by an economist of the old school, Ciccone, who likewise admits an effective co-operation of the state in the solution of social problems, provided it does not impair free private initiative.

These eclectic and moderating influences and this desire to accept if necessary the intervention of the state — although very cautiously and in such a way as not to paralyze individual and associated action but rather to foster its development — reveal themselves in Italian social legislation. The laws relative to savings banks, the legal recognition of mutual aid societies, the dispositions concerning co-operative societies in the code of commerce, the abolition of the provisions in the penal code for the punishment of strikes, — all these facts certainly cannot be regarded as tending towards state socialism, but seem much more to favor the development of individual initiative. Although the promotion of the national bank for the insurance of workmen against accidents is due to the exertions of the government, still it is a free institution, and very different from the compulsory state insurance of Germany. The legal provisions regarding child-labor in factories are less rigorous both in their text and in their application than in other states. On the other hand the more advanced projects for arbitration and for pensions for the working classes have not become law; and the bill making employers liable for accidents to their employees has been strongly resisted in the parliamentary debates. This last project has recently been supplanted by another, proposed by the above-mentioned Ferraris, which to a considerable extent adopts the German system of compulsory insurance. It is impossible to say whether this project will be brought up, or whether if brought up it will meet with the approval of Parliament. A like uncertainty surrounds another project which has been announced, and which would have much social importance, — a project for "internal colonization."

It is then an exaggeration to speak, as some do, of "state worship" as invading Italy, and of state socialism as dominant. But on the other hand it seems rather daring to assert, as Pantaleoni has recently done, that "the period of the historical

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method and of state socialism has come to a close." In fact, the statement is more than daring, it is wholly inaccurate. It is inaccurate with reference to "state socialism," if the assertion implies that either in the country or in the minds of the greatest living Italian economists the prevailing tendency is hostile to state interference; it is still more inaccurate as regards the influence of the historical school on the Italian economic thought of to-day.

As I have already insisted, the prevailing tendency among Italian economists is towards compromise, eclecticism. We should be sorry observers if we could not recognize the deep influence which the classical English school has exercised upon the best living Italian thinkers, and upon a great part of the new generation, so fruitful in economists. But on the other hand, how can we ignore the influence which the historical movement has exerted and still exerts on these minds, even if it has not always been accepted in its entirety or has been associated with other tendencies? How can we proclaim the disappearance of a school which counts among its followers Boccardo, Cognetti, Luzzatti, Messedaglia, Ferraris, Ricca Salerno, Lampertico, and — to name only a few of the younger men — Supino, Gobbi, and above all Loria, who presents in his masterly works a profound and fruitful association of classical English theories with German historical tendencies, and of the abstract deductive method with the method of observation of facts, — Loria, who bases all his most original conceptions upon the principle of the historical character of economic phenomena? In truth, if we are to say that this school has died out, we may well ask what school is still alive!

VII.

In Pantaleoni's opinion, probably, the most active movement in Italian political economy is that of the new school styled, rather inexactly, the "Austrian." It claims to connect all economic and financial phenomena with the theory of final utility. Another of its Italian supporters, Graziani, makes an

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assertion which is at least equally open to discussion, *viz.* that in the theory of value the utility theory "seems to close the evolutionary cycle of Italian thought."[1] In fact, in the last three years this theory, which has had a remarkable growth in various countries, has made headway also in Italy. Besides Pantaleoni and Graziani, it has won the adherence of other economists of repute, such as Mazzola, Professor Emilio Cossa, Conigliani and also, on its financial side, Professor Ricca Salerno.[2] Furthered especially by the efforts of Pantaleoni, Conigliani, *etc.*, this movement tends to reinstate in full honor the exclusive use of deduction and, in imitation of foreign economists, to reconstruct a "pure," *i.e.* an abstract political economy, characterized by a mathematical precision. Without passing a summary judgment on this school, it may at least be said that it seems still too young to attempt to bury the historical school alive — for this school was never more alive — and without even the funeral honors which its glorious traditions deserve. Nor has the new doctrine been so tested by criticism and experience that it may justly claim to have closed a cycle. To Italian thought, which resists crystallization in any formula whatsoever, a progressive future is happily still open.

It is needless here to do more than refer to the theories which, first announced by Jevons, were made the basis of a school by Böhm-Bawerk, Sax, Menger and other economists in various countries. It is well known that these theories deal more especially with value, the distribution of wealth and the science of finance. I shall confine myself to noting briefly a few Italian works in which these doctrines are accepted in part or as a whole, and very often amplified and carried out to new consequences.

Ricca Salerno has given us a very valuable *Manuale di Scienza delle Finanze*.[3] Besides a very accurate treatment of the special institutions of public finance (some of which he had

[1] *Cf.* Storia Critica della Teoria del Valore in Italia (Milan, Hoepli, 1889), p. 175.

[2] The last-named, however, follows the historical method in his other works. *Cf.* the work mentioned above; also that on method in political economy, vindicating the inductive and historical method (Modena, 1882).

[3] Florence, Barbera, 1888.

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already thoroughly analyzed in other works, *e.g. Prestiti Publici*), this book contains a critical comparison of the various theories prevailing in the science of finance, based upon a comprehensive knowledge of contemporaneous financial literature. As a result of this comparison Ricca Salerno adopts in great part the financial theories of Sax, based on final utility. These he elucidates and explains, extending the applications of the theory of value in the field of finance.

In a short work,[1] Dr. Emilio Cossa has presented the theory of utility in a clearer and more concise form than is customary among the disciples of this school. He examines its applications to the theory of value and of the distribution of wealth, and seeks to show how the new theory may be applied to the study of all economic phenomena of which utility is to any extent the basis. From the "abstract forms" of social economy he passes over to the study of "concrete forms," basing his study of distribution chiefly on Loria's theories, and attempting to connect the study of these concrete forms also with the theory of utility. Here his results seem to me less felicitous; but his book is worthy of note on account of this attempt as well as by reason of its clearness and exactness. It is noteworthy also on account of an important admission. Although the author burns incense before the altar of the "exact deductive method," asserts that it enjoys the favor of "a good part of the workers in the field of economic science," and discourses at length in his preface on the advantages he derives from employing it in his work, he also recognizes the importance of the inductive method and declares that deductive research should be intimately connected with an objective study of facts. And he confesses that the deductive method has yielded "less fruit," especially as regards the applications of the science, than a later and mainly inductive method.

Pantaleoni is a distinguished laborer in the field of finance.[2] He has published several works of great value, but is noted

[1] Le Forme Naturali della Economia Sociale (Milan, Hoepli, 1890).

[2] I may say, incidentally, that the followers of the Austrian school in Italy are nearly all writers on financial matters.

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especially for a study on *La Traslazione dei Tributi*,[1] a bold and original attempt to formulate laws governing the complex phenomena of the incidence of taxation. While the work reveals great learning and uncommon ability, it shows also a striking tendency towards abstraction and an exclusive use of the deductive method; and the author seems to care little to find out whether the results attained correspond in any measure with the facts of real life. Already in this work appear references to the utility theory. In his recent *Principi di Economia Pura*,[2] Pantaleoni has developed to their utmost limits both the theory of utility and the use of the deductive method. The *Principi* is a remarkable piece of work. As a monument of abstract logic, it bears fresh witness to the unusual qualities of the author's genius; but it is based on a method which, frankly speaking, I consider dangerous. In the face of pressing practical problems of every kind, both in production and in distribution, economic thought is drawn off into the field of barren abstractions. Under an attractive semblance of mathematical accuracy, these abstractions conceal much that is really false; for they do not correspond in the least to the complexity of concrete facts. While they distract the student with an imaginary logical construction, they lessen his interest in that positive study which tells us what is, whereas logic by itself gives us only what is thought. Thus in last result they deprive economic science of that great practical importance which it should have in society.

Pantaleoni makes economic science to consist in the study, in processes pertaining to wealth, of a single law, that of individual interest and the "least means" — *i.e.* the procuring of the greatest advantage with the least outlay, — and he finally reduces economics to the limits of a "science of value." He takes as his point of departure the *homo œconomicus* or, what amounts to the same thing, an abstract man, in whom the sole impelling force in every action is egoism or, as he styles it

[1] Rome, Paolini, 1882. I would also cite his investigations on the Ammontare Probabile della Ricchezza in Italia, and on the Pressione Tributaria.

[2] Florence, Barbera, 1889.

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in a new terminology whose usefulness I fail to understand, "hedonism," which means pleasure. His "pure economy" consists in such abstract theorems as can be logically deduced from the "hedonistic principle," that is to say, from the hypothesis of the "economic man."

Space fails us to follow the author in his minute and often quite original investigations. Beyond all doubt these researches constitute an important contribution to abstract science. But let us consider for a moment his economic man. In him the author has personified the principles of the classical English school, exaggerating their range of application (and also, to my mind, their defects) and abusing abstraction. Let us ask ourselves whether this abstract man corresponds to the concrete man of flesh and blood, who eats, drinks and is clothed, but who feels also something else than simple egoism, — to that man, in fine, who is not a pure incarnation of a simple abstraction, but a complete being; in life and in action the highest expression of complexity. Let us inquire whether the laws of that abstract conception, whether the consequences which result from it, can have any connection with this concrete reality; whether, in presence of the entirely different nature of the latter, their absolute value and their pretended mathematical accuracy will not rather disappear like a mist in the sunshine. In the meanwhile, the few modest conclusions of induction, the few laws cautiously derived from history, are quite abashed in presence of the hundreds of laws and abstract principles formulated by the author of the *Principi di Economia Pura.* The former vary, indeed, with time and with locality, but they have at least one undeniable merit: they are *true;* that is to say, they find their application in real life.

But to come back to the theory of utility and to the so-called Austrian school. If it counts already some disciples in Italy, it has also found some critics. Among these may be mentioned Supino, who, while demonstrating in a recent article on value[1] the insufficiency of the principal theories that have been formulated on the subject, makes a clever remark concerning the

[1] *Cf. Giornale degli Economisti*, July and August, 1889.

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utility theory. He says that it is based chiefly on a change of nomenclature, in that it includes under the single term utility two conceptions which hitherto have been held distinct, *viz.* utility and scarcity. He does not see the advantage of this change of nomenclature; for if the utility theory has availed in the explanation of some phenomena, especially in questions of finance, it becomes vague and uncertain when we consider value in respect to production. Recourse must be had to abstruse conceptions and the meaning of words must be modified in order to include under value those elements which previous definitions have expressly chosen to disregard. Moreover the subjective point of view which is taken in the study of value is one-sided and hence unsatisfactory.

Again, only last year, Loria [1] published a clear and succinct exposition combined with a searching criticism of the Austrian theories, in so far as they deal with circulation, distribution and finance. As to value, Loria observes that the utility of a product finds its exact measure in the sacrifice made to obtain it; for the sacrifice would not be made if the product did not compensate for it. The whole matter, then, reduces itself to the cost of production; and to say that the value of a ware is determined by its final utility is no more than to say that its value is determined by its cost. Accordingly the attempt of this new theory to simplify the law of value resolves itself into a mere question of words. For if we say that the value of a product is always determined by its final degree of utility, we do nothing more in substance than affirm that a product must be endowed with such usefulness as to compensate for the expense incurred in producing or in acquiring it. This is an incontestable fact, to be met with in all cases of exchange; but it in no wise gives us the law of value. Consequently Loria holds that the theory of final utility adds nothing to the theory of value, but simply makes a change of names.[2]

[1] *Cf.* La Scuola Austriaca della Economia Politica, in the *Nuova Antologia*, April 1, 1890.

[2] It seems to me that Böhm-Bawerk impliedly makes the same confession when, after having developed his theory of value determined by subjective estimates or "subjective values" of sellers and buyers, he acknowledges in the case of free com-

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As regards the phenomena of distribution of wealth, the advocates of the utility theory justify profit, or value of the capital, as a difference between the utility of present and that of future goods. For the relation of capitalist to workman is only an exchange in which the capitalist gives a present good, capital, to obtain a future good, product. The workman, who has no present goods, derives from those advanced by the capitalist an infinitely greater utility than is possessed by the equal quantity of future goods which he will have to make over to the capitalist; it is necessary therefore that he make over a larger quantity, and in the very difference lies the profit. At this point Loria observes that this is no explanation, since it gives no reason for the fundamental fact that some possess capital and others do not; according to this theory profit appears to be a sort of monopoly revenue, and is rather discredited than justified. Nor, in the opinion of Loria, is the theory of utility more fruitful in tracing out the laws regulating profit and wages.

In conclusion,[1] Loria says that it is the fundamental fault of this school that it undertakes to carry all economic phenomena back to the principle of utility. Now utility is nothing but a relation between product and man. Utility is to commodities what the shadow is to the body. Instead of studying bodies, this theory studies shadows, and in place of a profound investigation it is satisfied with a superficial glance. Thus, he says, a searching analysis of social relations — an analysis which would have led to a criticism of the present economic system — is evaded. The prospect of this danger had brought classical economy to a stand-still; the new economy shuns it in its turn.

If I may be allowed an observation at this point, I should say

petition the truth of the law of cost of production, which coincides here with the subjective estimates in conformity with which value is determined. But could it not be said on the other hand that, if this is so, it is not because the "cost" coincides with those "estimates," but solely because the Ricardian theory seeks to penetrate to the very essence of the phenomenon, whereas the utility theory is satisfied with superficialities? *Cf.* Böhm-Bawerk, Grundzüge der Theorie des wirtschaftlichen Güterwerts (Jena, Fischer, 1886).

[1] For lack of space, and to avoid a digression into a special field, I omit Loria's criticism of the Austrian theory of finance.

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that in its theory of value the new school does nothing more than express old ideas in new words, basing its system on double meanings, and introducing an obscure terminology and diction in a place where clearness at least was to be found, if not complete truth. Thus the utility theory is a notable step backwards from the Ricardian doctrine. As regards distribution, the theory furnishes a facile but unreal justification of social inequalities, in that it refuses to recognize the importance and true function of labor. Finally as regards method, this school, which claims to be in a measure a renewal and a continuation of the classical school, merely exaggerates to the point of abuse the latter's use of abstractions. With the classical economists these abstractions have at least the merit of depth; but the new school is satisfied with a superficiality which at best conceals itself under a complicated and often unintelligible form of statement. Finally, in spite of its pretensions to exactness in substance and in method, the fact that it seeks to bring everything back to the conception of utility, a conception which in itself is undefined and undetermined, inevitably precludes any approach to precision.

VIII.

I have still to speak of "pure socialism" in Italy; but the task is a brief one. Socialistic ideas have indeed been spreading through Italy and have gained serious and respectable followers. They exercise among us as in other countries a fairly good influence by criticism of social institutions and by furnishing effective incentives to better them. They have obtained a small representation in Parliament. But in the way of scientific socialism or theoretical works upon socialism, Italy has produced nothing worthy of special note. On one side a handful of anarchists, destitute of any kind of organic ideas, manifest their intellectual impotency by preaching unremittingly the doctrine of absolute abstention. Their tendencies may be gathered from the confused writings of Merlino. On the other side are the collectivists, with theories based more or less upon

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those of Marx, Schäffle, Lassalle and Malon, and with a few representative personalities, such as Turati, Prampolini, Costa, Colajanni and Gnocchi Viani. The ideas of the Italian collectivists present no real originality. They are to be found scattered in reviews and especially in propagandist sheets, often of ephemeral existence. A few little books also present their views. The most important are those of Turati[1] and Colajanni,[2] which treat a special question, the relations between crime and economic crises, and make front against the new positive school of criminal law, with which these socialistic writers have entered into a controversy conducted on both sides with true scientific seriousness.[3]

To speak of the practical socialistic movement in Italy would be an entirely different matter. Although it has a shorter history and has obtained less importance than similar movements in other countries, it cannot lightly be passed by. But its treatment lies outside of my theme, and the reader who is desirous of details is referred to Professor Bertolini's *Cenno sul Socialismo in Italia*, a minute and accurate study, which was published as an introduction to the Italian translation of Rae's *Contemporary Socialism*.[4]

IX.

Now that I have described the various tendencies at present manifest in Italian economic theory, it may be well to briefly notice some of the principal works of contemporaneous Italian economists, in order to see wherein they have contributed to the science in its various branches. Of course I cannot undertake a complete enumeration either of authors or of writings. I have already mentioned many works, and the limitations of space forbid more than an imperfect sketch of some of the best works of Italian economists of which I have as yet had no occasion to speak.

[1] Il Delitto e la Quistione Sociale (Milan, 1883).

[2] Socialismo e Sociologia Criminale; three volumes (Catania, 1884–1889).

[3] *Cf.*, on the side of the positive school, Ferri, Socialismo e Criminalita (Turin, 1884).

[4] Florence, Le Monnier, 1889.

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Some of the numerous treatises and compendiums of political economy deserve special notice. I have mentioned already Cossa's *Elementi di Economia Politica e di Finanza*,[1] — a very clear and concise work of the most scrupulous scientific precision. The various scientific theories are reproduced synthetically and with conscientious faithfulness. The historical references and a remarkably careful bibliography are a valuable aid to the student. Cossa has also produced another didactic work which is unique in its character: the *Guida allo Studio dell' Economia Politica*.[2] Besides an extensive treatment of the question of method and of the relation of political economy to other sciences, the *Guide* contains also a history of economic science which is unequalled in point of brevity, completeness and scientific accuracy. Both the *Elements* and the *Guide* have been translated into English.

Nazzani's *Sunto di Economia Politica*, which also has been cited above, merits attention not only for its successful combination of the classical and historical methods, but also because it adds to the theoretical a special part, dealing in a remarkably concise and accurate manner with various economic institutions and practical questions of greater importance. An extensive treatment of such questions is also found in combination with the general theory, in the excellent and more voluminous *Elementi* of Montanari.[3] Gobbi, whose historical works I have already praised, has also published a *Sunto di Economia Politica*,[4] which seems to me of much importance. It departs from the usual order of treatment, and shows an intelligent appreciation of German ideas and methods. A positive and practical spirit pervades the work, and its treatment of the theory of industrial enterprise is especially full and exact.

I have already had occasion to mention incidentally Lampertico's *Economia dei Popoli e degli Stati*, a work which occupies an important place in the contemporary economic literature of Italy. It is at the same time a treatise and a series of monographs; for while its five volumes contain a practically complete

[1] Milan, Hoepli.
[2] Milan, Hoepli, 1888.
[3] Padua, Sacchetto, 1881; 3d edition.
[4] Turin, Unione Tipografica, 1888.

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system of political economy, each one of them is an independent work, treating special topics. The first volume constitutes a general introduction, in which are discussed the general theories of the science and the questions of method. The volume on "Labor" is a monograph on the history of labor and on industrial questions. The volume on "Property" deals with the distribution of wealth. Finally the last two volumes present all the theories and practical questions relative to commerce, transportation, means of communication, money and credit. I have spoken elsewhere of the ideas incorporated in this most notable work: be it sufficient to say here that while it shows a wide acquaintance with economic literature, especially with that of Germany, and a broad treatment of practical questions, its chief excellence lies in the author's full and frequently original investigations of the historical development of various economic institutions.[1]

In Italy the theory of value has engrossed the attention of a large number of students. I may refer to Ferrara's profound researches, already mentioned, in which the "theory of the cost of reproduction" is developed, and which may especially interest American economists on account of their relation to Carey's theories; to Nazzani,[2] who has thrown light upon the "theory of the cost of production," perfected it by important distinctions and denied the possibility of covering the whole field with a single law; and finally to Loria, who has assigned to the theory of value an historical character. Wollemborg, Supino and Majorana have also written on value. The most recent contributions to the subject are those of Valenti,[3] who supports the English theories, and of Alessio,[4] who follows an eclectic tendency but leans rather toward the Austrian school.

[1] I do not mention here the treatise of Boccardo, nor the manuals of Pantaleoni and Ricca Salerno, because I have already touched upon them elsewhere. I must also forego speaking of other works which are deserving of mention, such as Professor Giacomo Luzzatti's *Lezioni di Economia Politica*, and Emilio Cossa's *Elementi di Economia Agraria*.

[2] Saggi di Economia Politica (Milan, Hoepli, 1881).

[3] La Teoria del Valore (Rome, 1889).

[4] Studii sulla Teorica del Cambio Interno (Turin, 1890).

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Among the best Italian writings on money are the learned and profound works of Messedaglia[1] of which I have spoken above; the numerous publications of Professor Ferraris;[2] those of Luigi Luzzatti, Magliani, Stringher, all relating chiefly to practical questions, but having great scientific value; the investigations of Professor Giacomo Luzzatti on *Moneta Ideale;* and, among the more recent theoretical contributions, the important work of De Viti de Marco,[3] in which the results of an increase in the gold supply are studied with much originality and learning, but in too abstract a method. This writer supports the quantity theory.

The studies relating to production are few in number. There is a valuable monograph by Gobbi, *Lavoro e la sua Retribuzione;*[4] a very important study by Ricca Salerno,[5] in which he analyzes capital in its genesis, its elements, its formation and its functions; also a contribution from Supino,[6] who studies capital in the social economy of to-day by the historical and positive method, considers it also in the distribution of wealth, and gives a careful and clear *résumé*, in particular, of the theories of Rodbertus. Finally, we have two profound discussions by Cossa,[7] on the limits of production and the theory of industrial enterprise.

More numerous are the researches relating to the distribution of wealth and to social institutions. The works of Loria, which should be described here, I pass over for a reason presently to be explained. Of peculiar value are the writings of Nazzani on rent and on the demand for labor. I must also allude to Toniolo's work on *La Distribuzione della Ricchezza*,[8] and to that of Graziani on profit, which gives accurate *résumés* of all the theories on this subject.

Social and provident institutions have been extensively dis-

[1] La Moneta ed il Sistema Monetario in generale (Rome, 1881–1883).

[2] *Cf.*, among others, Moneta e Corso Forzoso (Milan, 1879).

[3] Moneta e Prezzi (Città di Castello, 1885).

[4] Milan, Hoepli, 1881.

[5] Saggio sulla Teoria del Capitale (Milan, Hoepli, 1877).

[6] Il Capitale (Milan, Hoepli, 1886). I must mention another praiseworthy writing of Supino: La Navigazione dell' Aspetto Economico (Rome, 1890).

[7] In his Saggi di Economia Politica (Milan, Hoepli).

[8] Verona, 1878.

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cussed by Italian economists. Thus for example, besides the numerous writings of Luigi Luzzatti on social legislation and on co-operation, studies upon co-operative associations have been published by Manfredi,[1] by Wollemborg[2] (the apostle of rural credit banks in Italy), by Rossi, by Ravà, by Levi[3] and by the author of the present article. The general principles of insurance and the special question of the insurance of workmen against accident have been discussed in a series of valuable monographs. Zammarano[4] has examined insurance from the industrial point of view, studying the conditions of its practice and its organization, as well as its general scientific theory. Wollemborg[5] has studied it along the lines of industrial enterprise, contrasting mutual co-operative undertakings with the speculative enterprise of societies with fixed premiums; he devotes special attention to the insurance of cattle. Vivante has treated the subject very fully from the legal side in his masterly volumes on agricultural, marine and life insurance. But these subjects do not here concern us. As to the insurance of workmen against accidents, besides Ferrari's study, already mentioned, and works by Gobbi and Pisa, we have Mazzola's accurate monograph on the insurance of workmen in Germany.[6] He studies the theoretical side of the question by considering the conceptions of Wagner, Brentano, Schäffle, *etc.*, and the practical side by examining the Bismarck laws.

I have had occasion to speak incidentally of the science of finance, and I have cited a few of the best theoretical works in this field. I will mention here only a few of the most valuable studies which deal with questions of Italian finance. Such are Messedaglia's account of the reorganization of the land tax,[7] a masterly piece of work; Alessio's volumes on the *Sistema Tributario Italiano*,[8] in which the taxes actually levied

[1] La Società Anonima Cooperativa (Milan, 1887).
[2] L' Ordinamento delle Casse di Prestiti (Padua, 1886).
[3] Manuale par le Banche Popolari (Milan, 1886).
[4] L' Intrapresa delle Assicurazioni (Turin, 1887).
[5] Sull' Assicurazione, *etc.* (Udine, 1889).
[6] L' Assicurazione degli Operaj in Germania (Rome, 1886). [7] Rome, 1884.
[8] Turin, 1883–1888. Reviewed in the POLITICAL SCIENCE QUARTERLY, III, 532.

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in Italy are minutely analyzed and subjected to scientific criticism; Zorli's study on the *Diritto Tributario Italiano;* and many works by Salandra, Luzzatti, Magliani, Ricca Salerno[1] and others.

It should be noted that much material of the utmost importance to financial and economic science is to be found scattered through the Italian parliamentary documents, in the form of reports upon bills. I would call especial attention to the reports on the land tax and on other taxes, on legal tender, on banks of issue, on railroads, *etc.*, and also to the reports of the governmental commissions on industry and agriculture.

I cannot close this bibliographical *résumé* without calling attention to the progress which statistical science has made in Italy. To Messedaglia are due valuable contributions to statistical research. Bodio has organized the service of Italian statistics, so that it compares favorably with that of the larger states. Morpurgo[2] has published a suggestive study upon the relations between statistics and social science. Gabaglio is the author of an important work on the history and method of statistics.[3] Salvioni translated and completed the work of von Mayr. Other writers of prominence in this line are Ferraris, Rameri, Perozzo and Del Vecchio.

Finally we should not forget a periodical which has exerted and still exerts an excellent influence on economic studies in Italy, the *Giornale degli Economisti* of Bologna. Its early history has been sketched in the opening pages of this article. Through the activity of Professor Alberto Zorli, it resumed publication in 1886. Associated with Zorli in its management now are Pantaleoni, Mazzola and De Viti, and it has little reason to dread comparison with the leading foreign reviews devoted to political economy.

In the above pages I have mentioned incidentally, and in connection with a few special topics, one of the ablest Italian economists, Achille Loria, professor at the University of Siena.

[1] *Cf.* the review of Ricca Salerno's Dottrine Finanziarie in Inghilterra in the POLITICAL SCIENCE QUARTERLY, IV, 691.

[2] La Statistica e la Scienze Sociali (Florence).

[3] Storia e Teoria Generale della Statistica (Milan, 1888).

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My purpose was to close this article with a separate notice of his works. But as these works not only rank in originality and strength of thought among the best productions of the younger generation of Italian economists, but constitute in their entirety a complete system of social economy, — a system so novel and so important as to merit the serious attention of all economists, — and as it would be impossible to present this system adequately in a few pages, I shall devote a later article exclusively to the writings of Loria.

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RAILROAD STOCK-WATERING.

THE biennial report of the attorney-general of Nebraska to the governor, December, 1890, contains the following passage:

> The rates charged to-day [by the railroads] are large enough to yield a dividend amounting in some cases to eight per cent on stock that cost the stockholders nothing whatever but for the printing. . . . In many instances the only money invested in railroads is that derived from the sale of bonds, and the stock to the same amount is issued gratuitously to the shareholders upon which the people of the state are required to pay dividends by paying exorbitant rates of transportation. Section 5 of the constitution provides that no corporation shall issue any bonds or stock except for money, labor or property actually received and applied to the purpose for which the corporation was created. It is an admitted fact the railroads in this state have outstanding stock to a very large amount that has not been issued for money, labor or property. . . . All this is wrong and the officers of the corporations well know it, and it should be stopped at once, for unless those gigantic monopolies are checked in their mad race for wealth and power, the day is not far distant when the people will be bound hand and foot. . . . A maximum schedule of rates should be adopted by the legislature on a basis with other states similarly situated.

This quotation is given as containing an official statement of the opinions and wishes of a large part of the citizens of many of our Western states. The same views, or others more severe, may be found in the half-dozen bills introduced into the Minnesota legislature; in the long history of restrictive legislation proposed and in part adopted in Kansas and Iowa; in the resolutions of the Farmers' Alliance conventions in various states; and also, in a milder form, in the laws in force or proposed limiting railway charges in Michigan, Ohio and other states. The ground of complaint is in substance this: the railroads are charging extortionate rates and fares upon goods and passengers transported, and such extortion is proved by the fact that

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dividends are paid upon stock which cost the original holders nothing. Although other evidence as to unjustly high charges is sometimes introduced by those favoring a compulsory reduction of rates, — such as the complaint that a carload of corn yields to the carrier more profit than to the farmer, — yet in the end the measure of this extortion on the part of the railway is usually found in the fact that returns are being paid upon false capitalization.

The definition of the popular term "stock-watering" is perhaps sufficiently given in the quotation already made from the Nebraska attorney-general's report. It is the issue by a corporation of shares of stock for which nothing, or but little more than nothing, is received by the company in cash or value at the time of issue. This issue of unpaid shares may be made at the beginning of the enterprise or at any time thereafter. Since then the matter of a road's capitalization is thus proposed as the basis, not merely for regulation but for reduction of charges by statute, and since the same matter is of importance also to the general public to whom the stocks and bonds of these railways are offered as an investment, a brief discussion of railroad stock-watering as a commercial question has both a theoretical and a practical interest.

I.

In the arguments upon this subject advanced by state officers and legislators at the West, it is sometimes expressed and usually implied that first or original cost should alone be considered in speaking of adequate returns upon the investment. Such expressions as "money actually invested" are generally to be so construed. The language of the attorney-general of Nebraska must be taken in that sense if his words are not to be meaningless. "In many instances the *only* money invested in railroads is that derived from the sale of bonds," he says, with other remarks to the same effect. The resolution of the Nebraska Board of Transportation (composed of state officers), passed in May, 1890, declared that "rates for transportation

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should be adjusted to afford no more than a reasonable rate of income upon the capital actually invested in the *construction* of the roads." It is true that a new railroad, built experimentally through a state or section where there is little or no population, is usually constructed as cheaply as possible and may cost for road and equipment at first no more, we will say, than $12,000 or $15,000 per mile. As settlers come in and traffic increases the railway finds itself under an ever-increasing necessity to provide improvements, so that the growing business may be carried. Ground for enlarged terminals must be bought and tracks and buildings constructed; station houses must be built as villages grow; the original road-bed and track must practically be reconstructed,—so that in a few years it is found that the actual outlay of money has been double the first cost. If an accurate and separate record has been preserved of all expenditures more than sufficient to have kept the property in its original condition, it may easily appear that an additional amount of money equal to the share capital has been put into the road, though at first it may have been built by the proceeds of the bonds only. Thus the actual cost of the plant may soon equal, if it does not exceed, the total first capitalization (bonds and stock). The stock portion of this capitalization originally represented, not money then expended, but the measure of the expectation or hope entertained by the projectors as to the future profits. The greater the risk of the original enterprise, the larger must be the possible return if successful; for without the possibility in some form of a reward commensurate with the unavoidable dangers and delays to profit, a majority of our railroads would not have been so early begun.

In view of the importance attached to the stock-watering question in Western capitals, it is to be regretted that we have no detailed information of the amounts which our prominent railroads have thus expended from year to year for betterments. Doubtless such statements could be made up, at least approximately, by examination of items running back for years, but the labor required to do this would be enormous. Every one practically familiar with railroad building and operating knows the truth

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of the general statement that large sums over expenses proper are yearly spent to improve the property and charged to operating expenses, though sometimes met in part by an issue of bonds. The Hon. Jeremiah Simpson of Kansas, the successful Farmers' Alliance candidate for Congress, in a recent interview said:

> We have [in Kansas] about 8000 miles of road. The roads cost in round numbers $100,000,000, and the securities issued to that extent are reasonable and right; but the people who own the roads have bonded them for $300,000,000 and issued $200,000,000 more of watered stock. We who use the roads are really paying interest on $600,000,000 instead of on $100,000,000 as we ought to.[1]

When so challenged, the roads ought to have figures showing the actual amount of cost of their various properties. Yet the facts as far as known do not bear Mr. Simpson out. The Railroad Commissioners of Kansas say:

> It is quite common for inflated orators to assert that from $8000 to $10,000 per mile is all that a railroad legitimately costs and that all capitalization above that is water;[2]

whereupon the commissioners state the cost of the Kansas railroads to be on the average not more than $21,000 per mile, while the net returns in 1890 upon this cost amounted to $4\frac{1}{4}$ per cent, leaving the stock out of the account. It is their judgment that

> a railroad thrown down upon the prairie at a cost of $10,000 or $12,000 per mile is no criterion of the cost of a road over which immense trains run with safety 30 and 40 miles an hour.[2]

In response to the resolution of the Nebraska Board of Transportation, the secretaries of that board in July, 1890, made a report upon the earnings of the roads of that state. They found that, taking an average for the last three years, the Chicago, Burlington and Quincy's earnings had averaged 5.09 per cent[3] upon

[1] New York *Evening Post*, March 10, 1891.

[2] Report of Kansas Railroad Commissioners for 1890, p. xx.

[3] Professor Warner in POLITICAL SCIENCE QUARTERLY, for March, 1891, p. 76, puts the earnings at 7.5 per cent, by allowing for lands granted.

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the cost of its roads in Nebraska, including in that term the original investments and subsequent betterments; and they declined in view of this fact to recommend any reduction in charges.

Whatever our theory may be, practically it is impossible for a railway to increase its profits steadily and markedly, except through the carriage of a larger traffic at gradually falling rates. The railroads whose tariffs remain high, are those whereon the volume of tonnage remains comparatively small. Hence not only must additional capital (whencesoever derived) be put into roads at first cheaply built and afterwards developed, but — and this it is well to remember — such an increase of prosperity as may allow profits on unpaid-for stock can come only by a growth of business accompanied by a decrease in the charges per transportation unit.

II.

In considering the charges of extortion brought against railroads, another fact is often lost sight of. The reasonable return upon original cost, declared by many to be the limit of justifiable earnings, makes no allowance for the annual increase in values common to all other industries. If we are to judge of railway rates and profits by comparison, we must take as a standard "the full measures of fairly profitable investment in [neighboring] pursuits."[1] When farmers complain that they obtain little profit over cost of production for their corn or other grain, they include in their estimate of cost the use of land based upon its present value; and properly so. But a similar privilege should be allowed to the railroads. That the farming lands west of the Mississippi river have increased greatly in value during the last two decades, is generally known. Yet for the present purpose it will be well to give several instances of this increase, approximately at least, in figures.

The census of 1880 gave the total value of all farming lands

[1] Interstate Commerce Commission, Report upon alleged excessive charges on food products, June, 1890.

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and buildings in the central belt of counties of Illinois as $384,756,939, and the number of improved acres as 10,291,524. Leaving the unimproved land out of the account, the average value of farms in central Illinois in 1880 was less than $38 per acre. The Board of Agriculture for that state, in its estimates of cost of grain, allows $3.68 for use of land per acre in the same counties in 1890.[1] Capitalized at seven per cent this would give an average value of $50 per acre, an increase during the decade of thirty per cent. The Illinois Bureau of Labor Statistics, in its volume upon mortgages,[2] states the increase in farm values for the whole state at twenty-four per cent from 1870 to 1880, and at probably ten per cent from 1880 to 1890. In like manner the census of 1880 gives the value of farms in eastern Kansas at not more than $24 per acre. The State Board of Agriculture estimates use of land in the same counties in 1890 at $3.50, or a valuation of $50, — a doubling of value since 1880. Allowing for any over-estimate in 1890, there is no doubt that farm lands in Kansas have increased greatly in value during the ten years. As to the increases of values in cities and among manufacturers and merchants, they have been at least as large as among the farmers. Judged by the standard of profit around them, the railroads of Illinois, Kansas and other Western states could now be paying higher dividends than in 1880 without subjecting themselves to a just complaint because of that fact alone. It cannot fairly be said that the "increment" in railroad values is "unearned"; for of that increase it may be asserted that a large portion is really created commercially by the building and operation of the railroad. For without the means of transportation village lots and farm acres would alike be worthless.[3]

III.

Conceding that in fairness the value and profits of a railway should be allowed to grow with the growth of the country

[1] Circular 148; June, 1890.

[2] Report for 1888, p. lvii.

[3] See the discussion in Swann, An Investor's Notes on American Railways, p. 92.

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served, the question arises: how should that increase be registered? Real estate finds purchasers at prices which show the successive changes in values. Railroad property cannot be so treated. A merchant takes an inventory upon a certain day, and so can close his books for the year with exactness. Not so a railway, whose balance sheet must continue on the same nominal basis of values from year to year in order to preserve the continuity of the company. Corporations can show the yearly or daily fluctuations in the value of their assets, and in the value of their stocks and bonds based upon those assets, only by changes in the market prices. This occasions no trouble in the cases of industrial corporations whose stock is in few hands; but in the case of a railroad, whose shares are owned largely by persons exercising no direct control over its affairs, — by investors in short, — other questions arise. When increased profits are to be divided, higher dividends must be paid or additional stock issued. Usually the stock is "watered" to make the capitalization conform in a rough way to the value of the property as determined by its probable earning capacity. Stock-watering in this its innocent form is not an attempt to cover up extortion, but to solve a commercial question; it is not a cause of an increase in profits, but rather an effect of such increase, whose fairness (particularly toward travellers and shippers) should be judged in other ways and by other means. There is in the public mind a prejudice against the distribution of dividends by corporations at a percentage higher than the usual interest upon loans. The comparison between the dividend rate and the loan rate is however not a fair one: loans upon mortgage or collateral should rather be likened to the bonds of a railroad, both being secured debts. The stockholders are not creditors of the corporation but partners in the enterprise, for whose risks and profits the rate of interest on secured loans furnishes no true standard of comparison. By this prejudice against high dividends, the public is itself mainly responsible for such issues of unpaid stock as are made to conceal the fact that the earnings are larger than the usual rates of interest. Thus, also, it often comes about that the public deprives itself

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of a certain natural protection against unfair or inequitably high earnings, which if openly paid might attract competition through the openly displayed possibility of large profits.

More than that, the experience of all civilized countries has shown the uselessness of attempts to limit profits by legislation. Such attempts merely compel concealment in some way, or dull the edge of enterprise. For example, the charter of the Boston and Worcester Railroad (now a part of the Boston and Albany), granted in 1831, has this section:

> Toll is granted as may be agreed upon by the directors, provided that if, at the expiration of 10 years, the net income from tolls and other profits shall have amounted to more than 10 per cent per annum upon the cost of the road, the legislature may take measures to reduce the tolls in such a manner as to take off the surplus.

The same principle is found in the laws of New York and many other states, also in the English act of 1884, — coupled in this latter case with the power of government purchase on the basis of twenty-five years' profit. There is no known instance of such a limitation of dividends resulting in a reduction of railroad charges. Railroad tariffs are made with little or no reference to the capitalization. If the possible tolls will yield a return, well and good; if not, the capital must be readjusted to the circumstances. Such restrictions upon dividends do sometimes affect the number of improvements made in property or in train service by turning to betterments funds which would otherwise be distributed to stockholders; but this is the utmost. In the arguments before the Massachusetts General Court, in 1890 and 1891, upon the bill to compel the Boston and Albany to sell its new stock at auction (market value $200 per share) instead of distributing it at par to stockholders, — that is, to prevent a practical increase of dividends, — the main if not the only object of the bill was stated to be an ultimate reduction in that road's charges to its patrons; a vain hope in any case. The present Boston and Albany, successor to the Boston and Worcester, has by various means, it is estimated, paid much more in dividends than the charter quoted intended to allow. The long controversy in England (begun in 1890 and

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not yet closed), conducted before the Board of Trade by the shippers who favored a reduction in the maximum railway rates, brought out clearly the difficulty inherent in all such attempts. The railways were compelled, by competition of other routes or of product with product, to make lower charges in certain cases than in others where different business conditions prevailed. No one standard could cover both these cases; for the maximum could not justly be lower than what was a fair rate of itself, while in cases where cheap carriage was necessary, a higher maximum was no help but rather a disadvantage to those traders who required the lower tariffs. If the railways must make an average the low charges must be advanced.

Another theory, held without careful examination by some of our citizens, is that high dividends imply high charges. The contrary is usually true. The road just mentioned, the Boston and Albany, is an illustration. In 1889 it paid eight per cent dividends, while the Fitchburg Railroad, a parallel line, paid nothing. The average rates received per ton per mile by these roads were nearly the same on competitive through traffic; but on local traffic (*i.e.* traffic confined principally to the home road), the average charges of the Fitchburg were fifty per cent higher than those of the Boston and Albany. The patrons of the former road might willingly see the company paying fair dividends, if concurrently the rates were made lower. Some of the English gas companies are allowed to increase their dividends in proportion as the price of gas is reduced to consumers.[1] In the report of the Lake Shore and Michigan Southern for 1889, is a suggestive table showing the gross and net earnings of the company for fifteen years. The net income of the road is but little more now than in 1873, though the volume of traffic has increased enormously. The possible profit from this growth of business has thus been nearly all given to the public in the forms of lower charges and better service; and this too without any legislative compulsion. It is a question whether it would not be on the whole better for the public, if this road (and others with it) could distribute a percentage of dividends increasing slightly from

[1] See Farrer, The State in Relation to Trade, pp. 85–90.

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time to time. It would thus share a little in the advantages gained by the public and also share in the growth in prosperity of the cities and towns along its lines. There is no railroad in the United States paying large returns to its stockholders, either directly or through increase of its share capital, which cannot present a strong argument to justify such large profits because of the increased and increasing values of neighboring property or business; or whose rates can fairly be judged extortionate because of large returns upon real cost. Its tariffs may be open to criticism in some instances as violating the laws of trade to its own and its patrons' hurt in those particular cases; but all its charges cannot be extortionate without inviting loss and perhaps bankruptcy. Broadly speaking, a road cannot be permanently prosperous whose tariffs are ill-adjusted to commercial conditions.

IV.

Since the ownership of the property of a corporation must be represented by certificates of capital stock, the most natural condition of affairs is that where the nominal or par value of the certificates corresponds most closely to the commercial value of the railway as measured by its earning power. It is impossible for the small fluctuations in value to be followed by an increase or decrease in the amount of capital stock. Yet good financial management requires an approximation. This applies particularly to those corporations whose stock is bought and sold on the exchanges. A large increase in percentage of dividend paid does not increase the value of the stock proportionally. Assuming, for illustration, six per cent as the average of return upon money invested, if a road now paying that percentage should advance its dividend to twelve per cent, it would not find its stock doubled in value; or briefly, two shares of stock receiving six per cent each would be worth par each or $200 for both, while one share receiving twelve per cent would sell for about $150. Doubling the latter stock would increase the value of each holder's portion, but would require no more money for dividends than before. This law of finance was

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strikingly illustrated last year by the success of the English so-called "conversion companies." English journals have always denounced American methods of stock-watering, yet the British railways have been obliged for their own protection to appeal to Parliament for permission to double their ordinary stock. This ordinary or common stock receives whatever percentage of profits is left after paying fixed amounts upon the preferential stocks. In the case of the successful companies the common shares are now receiving a percentage upon their par value larger than the ruling rate of interest, though their selling value has not been increased correspondingly. Taking advantage of this state of things, a conversion company can buy a block of common stock receiving large dividends, and issue instead its own stock to a larger face value, this latter being divided into portions each bearing no more than the prevailing rate of interest on loans. As these portions sell at about par, there is a handsome profit on the whole transaction. As the same reasoning applies to either English or American railways, and as it involves a principle in finance not always understood, it may be well to give an actual occurrence.

In 1890 the ordinary shares of the London and Northwestern Railway were receiving dividends at the rate of eight per cent, the shares selling at about 180. A conversion company bought 5000 shares (par value $5,000,000) and held them in trust, issueing therefor its own shares in the manner following:

Principal at par.	Rate of dividend.	Proportionate part of original 8%.	Shares sold to public at	Am't realized from sale.
$5,000,000	3½ %	3½ %	100	$5,000,000
2,500,000	4 %	2 %	104	2,600,000
5,000,000	2⅜ %	2⅜ %	39	1,950,000
$12,500,000		7⅞ %		$9,550,000
Paid for 5000 shares at 180				9,000,000
Profit by the conversion				$550,000

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The first two issues, paying together five and one-half per cent of the original eight per cent dividend, are guaranteed. This the conversion company could safely do, because of the stability of the traffic on English railways, the London and Northwestern dividend on common stock averaging at least seven per cent. The last issue, put down at two and three-eighths per cent, is not guaranteed but receives whatever the railway may pay over the five and one-half per cent, *less* however one-eighth of one per cent which the conversion company reserves to itself as commission for receiving and distributing the whole dividends. Thus the conversion company runs no real risk, receives a perpetual commission on dividends of blocks of stock acquired by this and a number of other and similar transactions, and meanwhile makes an immediate profit of half a million dollars. No large capital is required, since the buying of the railway stock and the selling of its own shares can be carried on simultaneously. The objection of the railway companies was not to the fact that their stocks were "watered" by increasing the principal once and a half, but because large blocks were thus collected in few hands and these not the real owners. The conversion companies by their votes at railway meetings might turn the election; so the railways asked Parliament for permission to water their own stocks themselves, by increasing the nominal capitalization of the ordinary shares till their market value approached par. To this objections were raised, — for example by institutions having trust funds, because the law limited their investments so that the new stocks would not be available, — but nowhere was it asserted that the watering, whether done by conversion companies or by the railways themselves, would increase or diminish the railway charges upon goods or passengers by a particle. This unobjectionable kind of stock-watering is the result of financial and not commercial causes. It is cited here, not because it could be successfully carried out in America, — for it could not, owing to our more fluctuating conditions and values, — but as illustrating in a striking way one of the causes for our own issues of unpaid shares of stock.

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Another illustration of the principle under discussion may also be mentioned, that of the so-called industrial or commercial investment stocks. Manufacturing or trading firms in the United States have in many late instances turned themselves into incorporated companies, a part at least of the share capital being offered for subscription to the public. In no one of these cases has the original amount invested been stated: the public, it is considered, has no right to that information. The present status of the new corporation and its probable future, based upon the profits for several years past, are however always set forth in the prospectus; and these facts really form the basis upon which the amount of capitalization the concern can stand is fixed. What percentage upon the original investment the yearly profits have been, is not thought to have any bearing upon the value of the business at the time of incorporation. Nor can the possible selling price of the articles manufactured or sold be increased by the increase in the capitalization. This capitalization is fixed at such an amount as will, in the judgment of the promoters, permit the shares both preferential and common to be sold in the market at par. In one word, the amount of capital is based upon the amount of expected profits. This is perfectly proper, provided the profits are legitimate and the business stable.

But to return to the railways: what has heretofore been considered may be called the innocent form of stock-watering — to conform railway finances to a commercial law. But all stock-watering is not innocent. An unreal prosperity may be brought about through an illegitimate curtailing of expenses and in other ways, so that an extra issue of stock may falsely be made to seem justifiable on grounds of large but fair profits. Or honest prosperity may come up quickly, to fall away as quickly. In either case, whether through fraud or error, the increase of capital stock may be commercially unwarranted and a source of loss to innocent investors. But this is an injury to the capitalist rather than to those who use the railroad. Again, parties in control of a railroad who may own comparatively few shares, may decide

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suddenly to distribute new shares free; and by taking advantage of their exclusive information they may, if unrestricted, make vast sums for themselves. Or, further, the same directors, to perpetuate their control, may issue shares to themselves at merely the cost and trouble of buying old shares on a margin. This may result in giving over to men not the real owners the management of an important property. Such control is not likely to be exercised for the public good, but for speculative purposes only. Such stock-watering as this is an abuse of the principles of good finance, against which it is the right of the state to protect itself by all legitimate means. Yet the distinction between the right and the wrong of the practice is one always to be borne in mind. The laws of New York state try to meet this difficulty. Its statutes provide that no increase of capital stock shall be valid unless approved by a two-thirds vote of the shareholders at a meeting called for that purpose after twenty days' notice to each stockholder, and unless also approved by the Board of Railroad Commissioners.[1] A further amendment, passed in 1890, adds that no stock shall be issued except for money, labor or property. In passing upon applications for increase, the board since 1883 has wisely interpreted the statute as not condemning such issues where cause is shown. The board consents to an increase when the new stock is to be sold and the proceeds spent upon the property; but if the stock is to be distributed free, then the total capitalization (bonds and stock) must not exceed the cost of the property. It is the custom to include, in the term cost, all improvements paid for out of revenue.[2] Practically, therefore, when such an unpaid issue seems expedient for sound commercial reasons, nothing stands in the way of the board's approval; for expenditures above cost of mere maintenance from year to year can usually be shown by all prosperous roads. On the other hand the New York statutes have apparently stopped, or at least rendered very difficult, the

[1] General Railroad Act, section 9, as amended.

[2] "Stockholders are entitled to it to represent earnings which had gone into construction." Report for 1885, p. 222.

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fraudulent cases of stock issue just referred to. The necessary vote of so large a proportion of stockholders after a three weeks' notice of the reason for calling them together, renders the action of a minority-holding board of directors impossible, should such a board attempt to give money or control to themselves by a sudden issue. The real owners must first approve of the plan. Then the public stockholders' meeting and the public argument before, and investigation by, the Board of Railroad Commissioners take so much time that all concerned have an opportunity in which to arrange their holdings for the change. There is of course the objection to any free issue of share capital, however justified by trade circumstances, that it really gives to a holder at once and at a particular time that increase in value which may have been accruing for years. But by such laws as these of New York, the state has gone as far as it rightfully can to protect all interests. No statute can give exact justice to every complainant. To stop all free issues of stock, even the innocent, would, in the present state of opinion upon the unfairness of high corporate dividends, put a check upon corporate enterprise which would work injury to the public as a whole. The state selfishly wishes its capitalists to realize enough returns from incorporated capital so that as many railroads as are needed may be built, the public thus getting facilities in transportation not otherwise attainable.

V.

If we assume that railroad stock-watering is not so reprehensible as it has sometimes been supposed to be, when done for reasons which are considered to be in accordance with commercial usage and reason, the question may still be asked whether the state, by refusing to limit railroad profits, does not practically give our citizens over to possible extortions. This is a fair question, even if we concede that some increase in railroad profits from year to year may be advisable for the good of all concerned; for the inquiry may be made whether these increasing railroad earnings, if uncontrolled by statute, may not go far

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beyond the line of reason and become in fact extortionate. In considering this question we should ask ourselves upon what economic principles railroad rates adjust themselves, — having regard not so much to classification of goods according to value, weight per cubic space in car, *etc.*, as to the conditions obtaining in the trading world.

The value of the service or what the traffic will bear (not what it will not bear) is still the best standard for judging of transportation charges. In fixing rates upon articles carried to a competing market, the carrier's utmost possible charge is limited to the difference between cost of production at one point and the market price at the other. If the road exacts all this difference, the traffic will soon stop. If this difference is already so small as to leave no profit over movement expenses to the carrier, it is justified in refusing to lower its tariffs merely to help the producer sell his goods. If a product costs a seaboard manufacturer ten cents per pound, and if, owing to factories already built, the market price of the article in Chicago is twelve cents, this difference of two cents must be divided between producer and carrier if continuing shipments are to be expected. The manufacturer wishes to keep one and one-half cents as profit, while the carrier wishes to charge one and one-half cents, leaving the former but one-half cent profit. They finally compromise by giving the railroad and the factory each one cent per pound; with the usual result of compromises, that neither party is satisfied. Thus railroad rates in settled communities follow to some extent the principles of profit-sharing. What proportion of the profit above cost of production and of carriage each party in interest shall have, is essentially a commercial question. If the railroads exact all of it, they will have nothing to carry. "Enlightened selfishness" ought therefore to keep them free from such a commercial mistake; and it does, generally speaking. The cases where the manufacturer gets all the profit do not call for any comment.

Another kind of tariff-making comes into play when a rate is to be fixed on the article already referred to, from Chicago to

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some western village where there is a new settlement having no factories. Competition of product with product cuts no figure here; the rate is at first fixed at such an amount as will approximately yield a fair revenue to the road, and the consumer pays the Chicago price plus the freight charge. As time goes on, factories spring up at places further and further away from Chicago and nearer to the supposed village. The rate from Chicago must be reduced as trade conditions change; or else Chicago (or seaboard) merchants cannot sell in competition with the local factory. This process of reduction, if brought about naturally and not by legislation, does not involve loss to the carrier. The local far-western factory would not be built if the increasing population and prosperity did not warrant it; and this in turn assures the carrier an increase of traffic that more than makes good the gradual tariff reductions. Thus the trading of manufacturers, of merchants, of consumers and of the carriers, adjusts itself equitably to all in the long run, any error bringing its certain punishment. A railroad holding up its rates unduly, soon finds other sections and their roads advancing in wealth more rapidly; or else its cupidity invites a rival into its territory. This adjustment of trade and transportation conditions is never perfect, yet on the whole it is better than any adjustment attainable by outside interference. What has here been said of the carriage of manufactures, is true in general of the transportation of farm products eastward and of all the other traffic of a railway. Prices of dry goods, of groceries and of hardware are adjusted according to the laws of supply and demand. Prices for transportation must ultimately be governed by the same laws; although, owing to the magnitude and the complexity of the interests involved, it is not always easy to trace them in our tariffs. This adjustment, no matter how accomplished, must be accompanied, in transportation as in all other branches of business, by mistakes and losses.

Upon these general conditions manufacturing, trading and farming are carried on throughout the United States. It would be commercially impossible for all the roads of the country, even

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though combined under one ownership, to advance freight rates greatly, without facing bankruptcy through a stoppage of shipments — a bankruptcy which would involve all traders and carriers in one common ruin. Whether a rate on a particular article between given cities should in fairness be advanced or reduced a few cents per hundred pounds, is a question which can be determined only with knowledge of the special facts bearing upon that case. There is also to be considered the tremendous influence of our waterways upon rail charges — an influence directly and indirectly affecting every inland town. The lake and canal rates from Chicago to New York limit the charges from Chicago to Atlanta, Georgia; and the route to Europe from Western states through the gulf ports forbids too high charges from those states to Chicago and the Eastern seaboard. There is finally the test by the world's standard. Judged by this, — by the fact that average tariffs in Germany are one-half more than ours and in England at least double, — our American average charges are low.

But while it is undoubtedly true that the average charges of American railways are and must remain reasonable, there are yet chances for injustice. It is no argument in favor of an unfair charge on a particular product or between particular places, to say that our average is low. It is a legitimate function of government, if not a duty, to see that the cost of transportation to individual states, towns and persons, is rightly adjusted according to the circumstances of each particular case and as measured by the general standard. This is a regulation. But to determine the rates *per se* is quite another matter — one involving intricate questions, such as the moral responsibility of government for losses to private capital incurred under charges fixed not relatively but absolutely. While there always will be errors and perhaps in some instances extortion as long as railways arrange their own tariffs, yet there would be even greater errors in any system of charges devised theoretically by federal or state bureaus. Since a general and great advance in average railway charges is commercially impossible, we can safely leave the expected and desired general reductions to the slow but certain operation of

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natural laws, just as we do in the matter of prices paid for our daily food.

If now the proper charge, say on iron or cotton products from New England to Chicago or St. Louis, is a commercial question to be settled on its merits, it becomes clear how difficult it is to change that rate by any legislative prohibition of stock-watering, as in the Boston and Albany case. If the existing tariffs are fair to the New England manufacturer and to the railroad, the further question whether that railroad is paying ten or twenty per cent in dividends is somewhat irrelevant. The percentage of dividends paid depends really upon another set of conditions, *e.g.* the number of prosperous manufacturing towns upon the line of the road. It is true that the question, whether the tariffs from New England to the West are fair to the manufacturer, is one not easily determined in the abstract; and it is contended by many that the need of a reduction can be best shown by actual experience. It is my present purpose, however, only to draw attention to the fact that a reduction of dividends or a prevention of higher dividends in the future would in the nature of the case have no effect upon the railroad tariffs; these latter being based on the commercial value of the transportation offered and not on the resulting profits. These profits may be large, as in the case of the Boston and Albany, or small, as in the case of the Fitchburg, upon competitive rates which are almost exactly the same upon both roads.

The conclusion to be drawn is, that too much stress has been laid upon railroad stock-watering as a reason for compulsory reduction of charges; that the fact of such watering of railway capital is to be best explained as an attempt to adjust railway capitalization to the conditions common in other business undertakings; and that a distinction should be drawn in the public mind between stock-watering which is comparatively innocent in purpose and that which is not.

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THE WRIT OF CERTIORARI.

I. *History of the Writ in England.*

MANY of the present features of the writ of *certiorari* — which is to-day, in our country, the chief means by which the courts review administrative action — can be understood only by a study of its early history. Like most of the English writs, it was originally a prerogative writ; *i.e.* it was issued by the King by virtue of his position as fountain of justice and supreme head of the whole judicial administration. But unlike most of its fellows, which have become what are known as writs *ex debito justitiae*, or writs of right, the *certiorari* has preserved to a great extent — perhaps to a greater extent than any other writ — its original characteristics as a prerogative writ.

What now is meant, more precisely, by a prerogative writ? To answer this question requires an acquaintance with the position of the Crown in the administration of justice at the time that this writ was developed.

One of the most important powers which accrued to the Anglo-Saxon chieftains in the transition from the ducal to the royal dignity was judicial supremacy. The King was the supreme head of the nation with power over life, limb and property. The judicial supremacy did not, however, give him the right of pronouncing judgment; for this, in accordance with the Teutonic institution of popular courts, belonged to the members of the community. What it gave him was power to appoint the persons, *viz.* the sheriffs, who as royal representatives called the popular courts together; to see that justice was rendered in case of its denial; personally to judge those powerful litigants who could not be controlled by the popular courts; and to execute or have executed the sentences of the courts.[1]

[1] Gneist, Constitutional History of England (English translation, G. P. Putnam's Sons), vol. i, p. 23.

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In the Anglo-Saxon system of administering justice the Norman conquest at first introduced less change than in the other branches of government. While in other matters the early Norman Kings were absolute, in matters pertaining to the administration of justice the system was much the same as before the conquest. William the Conqueror bound himself solemnly to "maintain the good and well-tried laws of Edward the Confessor." This promise meant that the law should be administered "by the same persons, and for the same persons, and according to the same principles as in the Anglo-Saxon days." [1]

It is to be noted, however, that the Norman Kings reserved to themselves from the beginning the decision of all cases affecting the Crown, — including the more important criminal offences, which were regarded as violations of the King's peace, — and also all cases affecting the revenue.[2] The judicial proceedings which these cases necessitated were had before the King and the advisers whom the transaction of public business had forced him to summon to his side, and who, when united, formed what was known as the *Curia Regis* or *Aula Regis*, the court or household of the King.[3] Here the barons acted as judges, the King on their advice giving sentence. Soon this essentially judicial business, which was continually increasing, was attended to always by the same persons, and these persons got the name of justices, one of them being called the chief justice or justitiar. This Curia Regis soon increased its jurisdiction. The ancient customary process of the local courts, with that strict maintenance of formalities and that incapacity for regarding equitable considerations which seems inseparable from the ideas of compurgation and ordeal, was becoming antiquated. As a special favor, suits that belonged before the popular courts were allowed to be brought before the Curia Regis, to be decided by such new methods as the wisdom of the King and his counsellors might invent; and from the Curia Regis began soon to issue a series of writs which directed

[1] Gneist, *op. cit.* p. 165. [2] *Ibid.* pp. 168, 171.
[3] Stubbs, Constitutional History of England, vol. i, pp. 387–390.

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inquiry and recognition of rights as to land, the obligations of tenure, the legitimacy of heirs and the enforcement of local justice. These writs were undoubtedly derived from the process of the Carolingian lawyers. They were the expedients by which the *jus honorarium* of the King as fountain of justice was enabled to remedy the defects of the *jus civile* or *commune* as applied in the local popular courts.[1] The extension of the jurisdiction of the Curia Regis was accelerated by the partiality of the sheriffs who held the popular courts, and by the fact that in these courts race prejudices were found to influence the decisions.[2] Soon the officers of the Curia Regis were sent about the country; at first, in the time of Henry I, with no great regularity; but later, periodically.[3] These officers were known as the itinerant justices or the justices in eyre. They sat in the local courts, often taking the place of the sheriff.[4]

In 1178 Henry II made great changes in this system. He found that there were too many justices in the Curia Regis to do the work effectively. He therefore chose five of his own immediate servants, two clerks and three laymen, before whom he ordered the complaints of the people to be brought, but reserved the most difficult cases for his own hearing, to be decided as before, *i.e.* in the Curia Regis. This delegation of certain of the justices "to hear all complaints and do right" is regarded as the origin of the court of King's Bench, because the five judges chosen were to sit *in banco*. All financial suits, *i.e.* suits relating to the royal revenue, were still to be decided by the old Curia Regis, which, when organized for this purpose, was known as the Exchequer. As a result of *Magna Charta*, which provided that free persons and free property were to be judged according to the law of the land, a special court split off from the Exchequer. The Exchequer proper henceforth exercised administrative functions only. The new special court came to be known as the court of the Exchequer. It was organized similarly to the court of King's Bench. The adoption of Magna Charta resulted also in the formation of another court, *viz.* the

[1] Stubbs, *op. cit.* I, pp. 387–391.
[2] Gneist, *op. cit.* I, 168.
[3] 22 Henry II, Statute of Northampton.
[4] Gneist, *op. cit.* I, 392.

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court of Common Pleas. Magna Charta provided that the *communia placita*, common pleas or civil suits, were to be held at some fixed place and were not to follow the King about on his journeys throughout the country; accordingly, the seat of this court was fixed at Westminster.[1] The itinerant justices of the Curia Regis were soon replaced by the justices of *nisi prius* and assize, who were members of the royal courts.[2] In this way the entire administration of justice fell into the hands of the judges of the royal courts. But notwithstanding the formation of these common law courts, the King remained as before the fountain of justice; for, as we have seen, at the time of the formation of the court of King's Bench the King reserved to himself the decision of the most difficult cases. This reserved justice resulted later in the formation of other courts which have played a most important part in the development of English law.[3] Further, the development of these royal law courts did not shut the people out of all participation in the administration of justice. The judges appointed by the King were for the most part officers of a professional character; that is, they were educated in the law; but it was only the decision of the question of law that was taken out of the hands of the people and given into the hands of these judges. The decision of the question of fact was still rendered by the people, or by committees of the people which developed into the English jury.

By the end of the thirteenth century, as a result of this development, the judicial supremacy of the King was something quite different from what it had been at the beginning of the Norman period. The King was now the supreme head of the judicial system, the fountain of justice, in a sense until then unknown to the middle ages. He was in judicial matters what he was in other matters — practically absolute. All the judges, both at the centre and in the localities, were paid servants of the King and subject to his disciplinary power.[4] While actually

[1] Stubbs, *op. cit.* I, 486, 601; Gneist, *op. cit.* I, 386. [2] 13 Edw. I, c. 30.

[3] Stubbs, *op. cit.* I, 603; Palgrave, Essay on the Authority of the King's Council.

[4] For example, we find Edward I removing his chief justice and fining others for extortion and corruption. Gneist, *op. cit.* I, 391.

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working on separate lines, the three central courts remained formally connected with the King's personal representative, the Chancellor. From his office proceeded all the writs which were formulated by the King and his advisers, and by which actions were commenced.[1] By the time the royal courts were fully developed most of these writs were no longer writs of grace, granted by the King in his good pleasure, but were issued to litigants upon proper demand *de cursu* and became known finally as writs *ex debito justitiae*. Before long the court to which the application was made issued the necessary writ directly, without the intervention of the Chancellor.[2]

It was thus that the court of King's Bench received the power to issue a series of writs — *viz. mandamus, certiorari,* prohibition and *quo warranto* — through which it controlled the action of the other courts. The King's Bench was regarded as the highest court in the land, with a superintendence over all other courts; and, as there was no conscious distinction between justice and administration in these early days, over all lower authorities, whatever their nature. This position of superiority over the other authorities was due to the fact that the King was supposed always to sit in the King's Bench.[3] But although the writs just mentioned were issued without the intervention of the Chancellor, they never became writs *ex debito justitiae* or *de cursu*, since it was only in extraordinary cases that they were issued and only when some gross injustice was being done by other authorities. It remained the function of the King, through his

[1] "The defendant in the cases in the royal courts was summoned into court by writ original under the King's seal," which was kept in the office of the Chancellor. Palgrave, *op. cit.* p. 8.

[2] Thus King John gave to the Chief Justitiar authority to issue five writs; among them the important real-property writs of *mort d'ancestor*, novel disseizin and *de recto*. In the time of Edward I the clerks of the Chancellor were also allowed to issue in plain cases new writs *in consimili casu*, from which came the action on the case. — Gneist, *op. cit.* I, 394; Palgrave, *op. cit.* pp. 16, 17; Reeves, History of the English Law, II, 394, 507, 605.

[3] The King's Bench was the "*curia ubique fuerimus in Anglia.*" Bracton speaks of its judges as "chief, general, perpetual and superior, residing by the side of the King, who are to correct the injustice and errors of all others." See Gneist, *op. cit.* I, 384.

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court of King's Bench,[1] to judge of the necessity for their issue, and they accordingly came to be known as prerogative writs. And they came to be regarded as among the most important judicial remedies. It must, however, be remembered, when we speak of judicial remedies or of judicial bodies in these early times, that we do not mean what would be meant at the present time by such expressions. As has been shown, the judges of these tribunals had no fixed tenure. Like other royal officers, they were subject to the disciplinary power of the King; and the King not unfrequently made use of his power to influence their decisions.[2] Not only was the tenure of the judges the same as the tenure of royal officers in general, but there was no distinction made between judicial and administrative business. The justices of the peace, who had become the most important administrative officers in the localities (taking the place originally occupied by the sheriffs), had many important judicial duties to perform, and were regarded as judges — just as much so as the members of the royal courts. The court of King's Bench had powers of control over the justices of the peace, just as it had over all other authorities. It controlled the administration of government as well as that of justice. The reason why the King permitted the court of King's Bench to exercise such a control over administrative matters is to be found in the tenure of its judges, and in the fact that the King had still powers of reserved justice. He could exercise the strongest personal influence over the judges of the royal courts; and, if he found that the administration of the law was becoming too formal and technical to permit of efficient administration, he might exercise his reserved powers and transfer any matter to

[1] Some of these writs were issued by the Council, *i.e.* the Curia Regis, even after the development of the court of King's Bench. Thus the first case of *mandamus* on record, in the time of Edward II, was returnable to the Council. 1 Ryley's Pleadings, 534. But a case is referred to in Burrow's Reports, p. 2190, where this writ issued from the King's Bench. The first recorded case of *quo warranto* is found on the roll of the Curia Regis. Abbreviatio Placitorum, p. 21. Later, however, the King's Bench obtained the practically exclusive power to issue these prerogative writs.

[2] Witness the famous Hampden case in the court of the Exchequer. The judges were for the first time made independent of the King by the Act of Settlement, 1701.

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a newly created jurisdiction.[1] Thus was formed in the time of Henry VII the court of the Star Chamber, in order to control the nobility who had grown turbulent during the Wars of the Roses.[2] To this court was given a control over the actions of the justices of the peace which aimed at correcting not merely their decisions upon questions of law, — these were practically the only questions that came up before the King's Bench, — but also their decisions on questions of fact and of expediency.[3] Established originally to protect the weaker classes from the tyranny of the nobility, this court was used by the Stuarts in a fashion that led to its abolition in 1640. The result of its abolition was to remove the justices of the peace from all central control except that which was exercised by the court of the King's Bench over their decisions on questions of law. To provide some sort of control over the justices acting separately, which should extend to their decisions on questions of fact and expediency, a series of acts of Parliament permitted the individual, when injured by the act of a justice, in specified cases to appeal to the court of Quarter Sessions of the county.[4] This court consisted of all the justices of the county sitting together. As a result of these statutes, appeals might be taken to the Quarter Sessions from almost all acts of the justices affecting property rights or personal liberty.[5] There was thus formed in each county, for the decision of administrative questions, a court whose jurisdiction embraced both questions of law and questions of fact or expediency. Further, the commission of the justices of the peace enjoined upon them in difficult cases to take the

[1] *Cf.* Palgrave, *op. cit.* pp. 57–61.

[2] Other instances of the exercise of the reserved justice of the King are to be found in the establishment of the court of Chancery and of the Council of the North and the Council of the West. To deal with the religious questions resulting from the Reformation was established the court of High Commission. Later examples may be found in the establishment of the Probate and Divorce courts, after this jurisdiction had been taken away from the ecclesiastical courts, and finally in the Judicial Committee of the Privy Council for ecclesiastical and colonial appeals. *Cf.* Stubbs, *op. cit.* I, 603.

[3] *Cf.* Palgrave, *op. cit.* pp. 101–108.

[4] See Smith, Practice at Quarter Sessions (London, 1882), title Appeals.

[5] Gneist, Das Englische Verwaltungsrecht (1884), p. 397.

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advice of the royal courts. This came to be done finally by stating a case which was agreed upon by the justices and the parties before them, and which was then submitted to the royal courts and was finally decided by them.[1]

In consequence of these facts the certiorari lost much of its earlier importance in England, and its employment there became less frequent.[2] It had served the purpose of bringing proceedings of the justices, and of subordinate tribunals generally, before the King's Bench for review.[3] It was often used as a sort of an appellate proceeding, *e.g.* against the convictions and orders of justices of the peace;[4] but it was more often used for the purpose of removing a case before final judgment, where for some reason it was believed that a fair and impartial trial could not be had. Indeed the most common use of the writ in early times seems to have been to remove indictments before the justices. The reason why it was less often employed in appellate proceedings is to be found in the existence of the other methods of appeal from the final judgments of the justices which have been pointed out. Finally, the certiorari was also used in the course of ordinary appellate proceedings to bring up the record of the lower court from whose decision appeal had been taken, on the ground that the record as sent up was incomplete. This was called technically "certiorari for diminution of the record."[5] The writ of certiorari was therefore used from the beginning for three distinct purposes; first, as a means of removing a cause; second, to review a determination; and third, as means of correcting diminution in another proceeding —*i.e.* as an auxiliary remedy.

It is to a consideration of the certiorari as an independent appellate proceeding that this article will be devoted. In our country this is by far its most important use; because, for a number of reasons, we have been unable to develop generally any such

[1] Smith, *op. cit.* p. 518. [2] Gneist, Verwaltungsrecht, p. 406.

[3] The certiorari "lieth where the King would be certified of any record." Fitzherbert, Natura Brevium, p. 554. "The end of the writ is that more sure or speedy justice be done." Bacon's Abridgement, I, 559.

[4] Hawkins, Pleas of the Crown, vol. iv, p. 145, §§ 3, 4, p. 156.

[5] Tidds' Practice, 1167, citing Cro. Eliz. 155.

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methods of appeal from administrative decisions as have been created in England — any such methods as the appeal to the Quarter Sessions or the "statement of the case." There are, indeed, throughout our Southern commonwealths instances of appeals from the decisions of administrative officers to the county courts (which have largely taken the place in this country of the English courts of Quarter Sessions); and there are a very few instances of such appeals in other commonwealths. But in general our only method of appeal from administrative decisions has been by certiorari, and we have therefore been obliged to give to this writ a development which has greatly enlarged its scope and usefulness. Before I attempt to trace this development, it will be well to indicate how far the certiorari has retained its original prerogative characteristics, and what courts may issue the writ in the United States.

II. *Character of the Writ in the United States.*

In this country the general tendency has been to strip the certiorari of its prerogative character, and to reduce it to the position of an ordinary action. Nevertheless, even at the present time, the writ bears very plainly the stamp that was impressed upon it at its origin. Thus, for example, certiorari does not issue of course, as does the ordinary summons in an action; application has to be made to the proper court, and this may refuse or grant the application for the issue of the writ in its own discretion.[1] In the exercise of this discretion the courts have laid down several rules by which they will be guided.

(1) They will not issue the writ if there is any other adequate remedy; *i.e.* certiorari is an extraordinary remedy. Adequate remedies have been held to exist where it is possible to obtain a writ of error,[2] or to appeal, even to an administrative

[1] Duggen *vs.* McGruder, 1 Miss. 112; People *vs.* Mayor, 2 Hill (N. Y.) 9; Matter of Mount Morris Square, *Ibid.* 14. See also section 2127 of the New York Code of Civil Procedure. This section of the code has been construed by the New York Court of Appeals as providing that the decision of the court withholding or granting the issue of the writ cannot be reviewed in the Court of Appeals. People *vs.* Stillwell, 19 N. Y. 531; People *vs.* Hill, 53 N. Y. 547; People *vs.* Commissioners, 82 N. Y. 506.

[2] Petty *vs.* Jones, 1 Iredell L. (N. C.) 408.

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authority,[1] or to apply for any statutory remedy.[2] The only important exceptions to this rule are to be found in some cases where an appeal lay on the merits, and where nevertheless certiorari was issued to test the question whether the tribunal whose record was to be brought up had exceeded its jurisdiction;[3] and in certain other cases, especially in North Carolina and Tennessee, where it is held that if one without fault has lost the right to appeal, he may get a certiorari if the time for appeal has gone by.[4]

(2) The courts have held that they will not issue a certiorari where the party applying for it is guilty of laches and has slept upon his rights.[5]

(3) The courts will not issue a certiorari where substantial justice has been already done, or where very mischievous consequences will result from its issue, or where the parties cannot be placed *in statu quo* by its issue,[6] or for a mere defect in form[7] or of jurisdiction.[8]

(4) Finally the courts have held that the certiorari may not be used simply for the purpose of the maintenance of the law. That is, persons applying to the courts for the issue of the writ

[1] Beck *vs.* Knabb, 1 Overt. 55, 59, 60; Storm *vs.* Odell, 2 Wendell (N. Y.) 287; O'Hare *vs.* Hempstead, 21 Iowa, 33; N. Y. Code, sec. 2122, paragraph 2.

[2] Tucker's Petition, 27 N. H. 405; Baldwin *vs.* Goodyear, 4 Cowen, 536. See also Harwood *vs.* French, 4 Cowen, 501.

[3] Kingsland *vs.* Gould, 3 N. J. L. 161; Krummick *vs.* Krummick, 14 N. J. L. 39; Burrows *vs.* Vandervier, 3 Ohio, 383.

[4] Trice *vs.* Varborough, 4 Iredell L. (N. C.) 11; Kearney *vs.* Jackson, 1 Verg. (Tenn.) 294; Skinner *vs.* Maxwell, 67 N. C. 257; King *vs.* Williams, 7 Heiskell (Tenn.) 303.

[5] *Ex parte* Hagaman, 2 Hill (N. Y.) 415; Bannister *vs.* Allen, 1 Blackford (Ind.) 415; Holden *vs.* Commissioners, 7 Metcalf (Mass.) 561; Elmendorf *vs.* Mayor, 25 Wendell, 693; Bentz *vs.* Detroit, 48 Mich. 544; Carpenter *vs.* Commissioners, 64 Mich. 474. The time within which the writ may be applied for is sometimes fixed by statute. Thus the N. Y. Code, section 2125, allows four months after the determination in which to issue and serve a certiorari reviewing the determination.

[6] Hancock *vs.* Boston, 1 Metc. (Mass.) 122; Rutland *vs.* Worcester, 20 Pick. (Mass.) 71; Gleason *vs.* Sloper, 24 Pick. 181; People *vs.* Supervisors, 15 Wendell, 198; People *vs.* Rochester, 21 Barb. 656.

[7] Elmendorf *vs.* Mayor, 25 Wendell, 693; Monterey *vs.* Berkshire, 7 Cushing (Mass.) 394; Smith *vs.* Commissioners, 42 Me. 395, 402; Criswell *vs.* Richter, 12 Texas, 18.

[8] Fowler *vs.* Lindsey, 3 Dallas (U. S.) 411, 413.

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must show to the satisfaction of the court that they have some special interest involved which is peculiar to themselves and that the issue of the writ will result to their advantage.[1] Thus the courts have refused the issue of a certiorari to declare a municipal ordinance void, where the applicant for the writ had been convicted of its violation and had paid the fine imposed;[2] or to reverse the action of an authority in laying out a drain, where the applicant for the writ could show no personal injury from the action complained of. The simple allegation also that the applicant was a resident and a taxpayer has been held to be insufficient to justify the issue of the writ in the absence of any further special interest.[3] Such are the prerogative characteristics of the writ of certiorari at the present time.

III. *What Courts may Issue the Writ.*

As the certiorari is a writ of an extraordinary character, it is not every court that is permitted to issue it. It has already been shown that in England, after the disintegration of the King's Council and the development of special royal courts, it was the court of King's Bench that possessed the power to issue the extraordinary legal remedies or prerogative writs of which the certiorari was one. As a result of this fact, the rule in the United States seems to be that certiorari as a means of appeal issues only from these courts which have inherited the jurisdiction of the English court of King's Bench. What courts have inherited this jurisdiction is usually determined by the constitutions or statutes of the separate commonwealths. In New York the code of civil procedure, section 2123, provides that where no special exception is made by law, certiorari to review a determination can issue only out of the Supreme Court or a superior city court. But while the matter is thus governed largely by special statute, still two general principles may be laid down:

[1] People *vs.* Leavitt, 41 Mich. 470; People *vs.* Walter, 68 N. Y. 403; People *vs.* Phillipps, 67 N. Y. 582. [2] People *vs.* Leavitt, 41 Mich. 470.

[3] State *vs.* Lamberton, 37 Minn. 362. See also Granville *vs.* County Commissioners, 97 Mass. 193; Waston *vs.* May, 6 Ala. 133; Davis Co. *vs.* Horn, 4 Greene (Iowa) 94.

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(1) Certiorari may not ordinarily be issued by courts of limited jurisdiction, but only by courts of general common-law jurisdiction, since it is only the latter class of courts that have inherited the jurisdiction of the court of King's Bench.

(2) The issue of the writ is an exercise of an original jurisdiction; and therefore courts whose jurisdiction is appellate only cannot, in the absence of statutory provisions, issue the writ to review a determination. Of course appellate courts do issue the writ when it is used for the purpose of correcting diminution.

As far as the United States courts are concerned, it may further be laid down, as a general principle, that they have not the power to issue certiorari to review a determination. Several cases have decided that certiorari will not issue from the Supreme Court except in case of diminution,[1] or from the circuit courts except as an auxiliary remedy;[2] while the same reasons which forbid the higher courts to issue the writ — *viz.* the absence of the grant of such jurisdiction in the constitution or in the judiciary act — would seem to preclude its issue by the district courts. There seems, however, to be no reason why the Supreme Court of the District of Columbia should not have the power to issue the writ of certiorari; for it is well settled that it has the power to issue the *mandamus*, and this latter power is derived from the fact that it has inherited for the territory of the District of Columbia the jurisdiction of the King's Bench.[3]

It should be noted that the McKinley administrative act gives the circuit courts of the United States power to issue certiorari to review the determination of the general appraisers as to rates of duties and classification of articles. The effect of this will at once be seen, when it is remembered that by this act suits against the collector of the customs may no longer be entertained by the United States courts. Where there was

[1] *In re* Kaine, 14 Howard, 103, 131; *Ex parte* Metzger, 5 Howard, 176; U. S. *vs.* Young, 94 U. S. 258, 259; *Ex parte* Vallandigham, 1 Wallace, 243.

[2] *Ex parte* Van Orden, 3 Blatchford, 167. See also Patterson *vs.* U. S. 2 Wheaton, 221.

[3] See Kendal *vs.* U. S. 12 Peters, 524.

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previously a remedy of right, a writ *ex debito justitiae*, there is now only a prerogative remedy which the court may grant or refuse in its discretion.

IV. *Authorities Subject to the Writ.*

Certiorari to review a determination was employed from the outset as a method of appeal from the decisions of authorities or tribunals not acting in accordance with the common law, — *i.e.* created by statute and possessing only a limited jurisdiction.[1] The regular method of appealing from the decisions of authorities possessed of general common-law jurisdiction was by writ of error. Among the authorities subject to certiorari were included all quasi-public bodies, — *e.g.* the disciplinary authority in a profession or the visitors of a foundation, — as this was the only way by which their proceedings could be kept within the law.[2] Originally the justices of the peace were the officers to whom certiorari was most frequently issued. They formed the most important class of authorities not acting in accordance with the common law. Now the justices of the peace had both judicial and administrative functions to discharge; but these two classes of functions were not clearly distinguished. Their administrative functions were treated as judicial, largely because they were discharged by officers who had come to be recognized as judges. In this country, however, justice has been separated from administration. This separation began in New York with the establishment of the office of supervisor in 1683; and it has

[1] Rex *vs.* Inhabitants in Glamorganshire, 1 Ld. Raymond, 580; Bacon's Abridgment, art. Certiorari, B.

This rule has been very generally adopted in the United States. Commonwealth *vs.* Ellis, 11 Mass. 464; *Ex parte* Tarleton, 2 Ala. 35, citing cases; Commonwealth *vs.* Low, R. M. Charleton (Ga.) 298; Ruhlman *vs.* Commissioner, 5 Binney (Pa.) 24; Phillips *vs.* Phillips, 8 N. J. L. 122; Trigg *vs.* Boyce, 4 Hayward (Tenn.) 100; Williams *vs.* Carman, 1 Gill & J. 184, 196; Matthews *vs.* Matthews, 4 Iredell (N. C.) 155; Bridge Co. *vs.* Magoun, 8 Greenleaf (Me.) 292, 293; Appeal of Commissioners, 57 Pa. St. 452.

[2] See a very interesting case, Groenvelt *vs.* Burwell, 1 Salkeld, 263, 1 Ld. Raymond, 580, in which it was held that certiorari lay to review a judgment given by the censors of the College of Physicians and Surgeons. For a similar case in the United States, see State *vs.* Swift, 2 Hill (S. C.) 367.

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become so general that almost all administrative work is attended to, at any rate in first instance, by officers unconnected with the administration of justice, such as supervisors, assessors, highway commissioners, overseers of the poor, selectmen, *etc.* When this separation of administration from justice was accomplished, it was questioned whether the courts could make use of certiorari to review the acts of the new administrative authorities. They had indeed always used the writ to review the acts of persons discharging similar functions; but these persons had been regarded as judicial officers, while the new authorities were purely administrative.

The question was not ordinarily stated in the form here indicated. It was generally stated thus: May the courts issue certiorari to review other than judicial acts? And, following old traditions, some of our courts early laid down the rule that they would not issue certiorari to review a ministerial or legislative act, but would confine its use to the review of judicial acts. This rule seems clear and simple; but it has proved to be difficult of application. In determining what is and what is not a "judicial act" it was obviously possible for the courts to consider either the nature of the act itself or the character of the authority performing the act. But if they sought to apply the first of these tests, they were confronted by an ambiguity in the use of the term "judicial act." This was often employed as equivalent to "discretionary act"; and, as we shall see later, it was a rule of the common law that discretionary acts were *not* reviewable on certiorari; so that this line of distinction seemed wholly unavailable. Accordingly the courts sometimes fell back on the second test; and refused to recognize any act as judicial unless it was performed by a court. But there was still a third possible construction. Starting from the principle of the separation of governmental powers, the courts might hold that an act performed by a body not strictly judicial in character was nevertheless an exercise of judicial power as distinguished from executive or legislative power, and therefore a judicial act. It is in fact in this last sense that the courts seem generally to have used the term "judicial act" in

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laying down the above rule.[1] Here it is obvious that the courts revert to the attempt to determine the nature of the act itself, although they seek to do this by an appeal to a new standard, *viz.* the nature of the power exercised. But this attempt brings new difficulties. It is a simple matter to say whether or not an act has been performed by an authority which constitutes part of the judicial branch of the government as actually organized; but to determine whether the power exercised by a particular authority in a given case is or is not judicial *in its nature* is anything but a simple matter. It is far from easy to apply the principle of the separation of powers to existing governmental institutions. It is very difficult to discover by its aid any clear line of demarcation between administrative or legislative acts on the one hand and judicial acts on the other. And it is even more difficult to obtain any general agreement upon such questions, for the simple reason that the standard applied is purely subjective. The separation of governmental powers is not a statement of what is, but a theory of what ought to be.

The difficulties here indicated have manifested themselves in almost every concrete case in which the courts have attempted to apply the rule. The difficulty of reaching a decision and the confusion of decisions reached have been especially marked in the matter of the laying out of highways and streets and the building of sewers. The courts of Alabama, Massachusetts and Michigan hold that the action of commissioners of highways or of a common council of a city in laying out highways and streets is judicial in character and may be reviewed on certiorari.[2] The courts of Maine and New Hampshire hold that the same duty, when performed by selectmen of a town, is not judicial and that their act may not be quashed on certiorari.[3] But the courts of the latter state further hold that when this act is performed by a court, *e.g.* the court of sessions or the county court, it is judi-

[1] See Commissioners *vs.* Kane, 2 Jones L. (N. C.) 288.

[2] Commissioners *vs.* Thompson, 15 Ala. 558; Commonwealth *vs.* West Boston Bridge, 13 Pickering, 195; Parks *vs.* Boston, 8 Pickering, 217, 225; Stone *vs.* Boston, 2 Metc. 220; People *vs.* Brighton, 20 Mich. 57.

[3] Harlow *vs.* Pike, 3 Greenleaf (Me.) 438; Robbins *vs.* Bridgewater, 6 N. H. 524.

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cial in character and therefore may be reviewed.[1] In New York the power of the courts to issue the certiorari to highway commissioners is doubtful;[2] and the power of the courts to issue the writ to the common councils of cities to review their acts in the matters of streets and sewers is denied.[3] The New York rule is thus opposed to that adopted in Massachusetts, and this opposition is due to the fact that the New York courts could not bring themselves to regard acts which were plainly of an administrative character (or, as the courts say, of a quasi-legislative or ministerial character), as judicial acts. In the case of People *vs.* Mayor,[4] the judge carries the distinction to quite a length in saying that while "an ordinance of the common council for the construction of the sewer . . . was a simple exercise of their ministerial, or, if I may use the expression, legislative power," and while the decision of the council on the question of expediency could not be reviewed; still "it is competent for us in a proper case to vacate the estimate and assessment of the common council in affirming those proceedings, as they then acted in a judicial capacity." That is, if sewers were built from the proceeds of bonds or taxation, no matter how illegal or irregular the ordinance ordering the construction was originally, certiorari would not issue, because the ordinance was not a judicial act; but if the sewers were to be built from the proceeds of assessments for local improvements, certiorari would issue to quash the decision

[1] Robbins *vs.* Bridgewater, 6 N. H. 524; Dorchester *vs.* Wentworth, 31 N. H. 451. This latter rule, that the action of bodies recognized as courts in laying out highways is judicial and subject to the writ of certiorari, seems to be the general one. See Nichols *vs.* Sutton, 22 Ga. 309; French *vs.* Barre, 50 Vt. 567; Prigden *vs.* Bannerman, 8 Jones L. (N. C.) 26; *Ex parte* District of Pittsburgh, 2 Watts & Sergeant (Pa.) 320; Thompson *vs.* Multonomah Co., 2 Oregon, 34.

[2] See Lawton *vs.* Commissioners, 2 Caines Rep. 179; People *vs.* Covert, 1 Hill, 674; Fitch *vs.* Commissioners, 22 Wendell, 132.

[3] Thus the New York courts have held that a city ordinance directing the building of a sewer or the opening or widening of streets is not a judicial act and is therefore not reviewable on certiorari. People *vs.* Mayor, 2 Hill, 9; People *vs.* Mayor, 5 Barb. 43; Matter of Mount Morris Square, 2 Hill, 14. Two of the cases holding this view (*viz.* 2 Hill, 9 and 5 Barb.) are not very strong, inasmuch as the certiorari was refused partly, at any rate, on the ground that the issue of the writ was discretionary with the court. But in both cases the distinction between judicial and other acts seems to have influenced the decision.

[4] 5 Barb. 43.

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as to the assessment if it was based upon an illegal ordinance, since the act of assessment was a judicial act.[1] In the Matter of Mount Morris Square,[2] which is a particularly interesting case, Judge Cowen takes somewhat the same position. He criticises the attempts (particularly in the case of Parks *vs.* Boston),[3] to classify acts purely legislative or administrative in character under the head of judicial acts, and explains these attempts as due to the fact that municipal authorities have been assimilated with the English commissioners of sewers, who (he says) were regarded as courts.[4] He thus seems to adopt the rule that the character of the act is determined by the character of the body which performs it. He soon, however, departs from this standard and adopts the rule that the character of the act is determined by the character of the power exercised: for he proceeds to analyze the acts of municipal corporations and their officers and finds that they consist, in the first place, of what he calls corporate acts, *e.g.* the making of by-laws, voting taxes, appointing officers; in the second place, of governmental powers, *e.g.* the power of eminent domain for streets; in the third place, of really judicial powers, *e.g.* the power to assess property. In this last class of cases alone he believes that certiorari may issue, though he admits, citing *Ex parte* Mayor of Albany,[5] that it had become the fashion to ask for certiorari in the other cases as well. He cites the case of Leroy *vs.* Mayor [6] as the cause of all the trouble in New York, since it allowed the writ to issue to the corporation instead of to the commissioners of assessments. The result of this opinion and of the determined attempt on the part of Judge Cowen to prevent any confusion as to what was a judicial act [7] was to keep the law of New York, for a time at least, in line with his

[1] See as to this point People *vs.* Mayor, 9 Barb. 535, 542.

[2] 2 Hill, 14. [3] 8 Pickering, 217.

[4] This point has really very little force; for in England, as has been pointed out, no distinction was originally made between administrative and judicial bodies.

[5] 23 Wendell, 277. [6] 20 Johnson, 430.

[7] But even after his explanation, the distinction between judicial and other acts was not very clear. See Rochester White Lead Co. *vs.* the City of Rochester, 3 N. Y. 463, 467.

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theory — and to give less protection to private rights than the Massachusetts rule afforded.[1] Thus in the case of People *vs.* The Board of Health,[2] the judge bases his decision upon this general rule, that the act must be judicial in character, saying:

> I cannot adopt the conclusion that it is in any sense proper to review the legislation of any body having authority so to do, even where in the course of such legislation they might exceed the powers vested in them.

This New York rule seems to have gained a foothold in Ohio.[3]

Such is the result of the attempt to apply to actual practice the rule that certiorari will issue only in case the act to be reviewed is a judicial act. In the concrete case of highways and the like, the Massachusetts rule differs from the New York rule and, while it affords fuller protection to private rights, is less logical; and in New Hampshire the whole question is made to turn on the character of the body performing the act. If performed by the selectmen, the act is not judicial and may not be reviewed; if performed by a court of sessions, a well-recognized judicial body, the same act is metamorphosed into a judicial act and may be reviewed on certiorari.

The rule is therefore practically unsatisfactory, — a fact which has been recognized by the courts of several commonwealths, but first and most clearly by those of New Jersey. The New Jersey courts have wholly rejected it, and have taken the ground that ordinances passed by a city council may be reviewed on certiorari, not because they are judicial acts, but because of the general principle that the courts have power on certiorari to remedy wrongs inflicted upon individuals whether by corporate acts or by the acts of special jurisdictions created by statute.[4] In the case of Camden *vs.* Mulford the judge who delivers the opinion of the court says that, before the attack of Judge Cowen already spoken of, evidence of the belief in the existence of this general principle is to be found in some of the New York cases. And it is to be noted that in some of the earlier cases cited later in this article — particularly in the

[1] *Cf.* Dillon, Municipal Corporations (4th ed.), II, 1126, notes.
[2] 20 How. Pr. 458, 460. [3] Dixon *vs.* Cincinnati, 14 Ohio, 240.
[4] State *vs.* New Brunswick, Coxe (N. J.) 393; Camden *vs.* Mulford, 26 N. J. L. 49.

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Cardiff Bridge case — the English judges seem to have been of the same opinion. The only objection to the New Jersey rule would seem to be found in the old distinction between void and voidable acts. It is claimed that certiorari is unnecessary in the case of a void act, because such an act may be impeached collaterally; that all acts not judicial, when done in excess of jurisdiction, are void; and therefore that certiorari should not issue to declare them so. From the standpoint of legal logic it may be answered that a judicial declaration of the original nullity of an act is not the same thing as the impeachment of a voidable act, and that certiorari may be used for the former purpose without transforming the act reviewed into a voidable act. As far as historical precedent is concerned, this distinction, as I shall point out later, really never had any great influence upon the issue of the writ in England nor, it may be added, in this country, notwithstanding several dicta to the contrary. As a matter of policy, this distinction is objectionable, because its application would deprive individual rights of a most precious means of protection in a class of cases which is increasing in number with the more complete separation of administration from justice.

The New Jersey rule has been practically adopted in several other commonwealths — though sometimes, apparently, without full consciousness of the fact on the part of the courts. Thus in Maryland it has been held that certiorari will issue to review the action of the mayor and common council of a city in improving the streets; but no reason is given for the decision except the general power of the courts to quash illegal action on certiorari.[1] In Illinois a certiorari issued to review the action of highway commissioners on the broad principle again that "certiorari may issue for the purpose of reviewing the proceedings of all inferior tribunals and jurisdictions where they exceed their power or proceed without authority of law."[2] The same doctrine seems to be held in Missouri[3] and in a late case

[1] Swann *vs.* Mayor, 8 Gill, 150.
[2] Detrick *vs.* Highway Commissioners, 6 Bradwell, Ill. Appeals, 70.
[3] St. Charles *vs.* Rogers, 49 Mo. 530.

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in Maine.[1] The United States Supreme Court has either held or intimated that certiorari is the proper remedy in these cases, though here again no reasons are given.[2] In Wisconsin certiorari has issued to test the validity of the proceedings of a common council in laying out streets,[3] and was said to be the proper remedy to review the revocation of a license by a council.[4] In one Wisconsin case the court was confronted with an awkward alternative. It was called upon to determine whether the decision of the superintendent of public instruction concerning the division of a school district could be reviewed upon certiorari. If the court held that the act of the superintendent was not judicial, it felt obliged to decide that certiorari could not issue. If on the other hand it held that his act was judicial, it would strip him of a series of most valuable powers; since the constitution declared that none but judicial officers should exercise judicial powers, and the superintendent was evidently not a judicial officer in the sense of the constitution. The court, however, was equal to the occasion and succeeded in avoiding both horns of the dilemma. It declared that the act in question, while not absolutely and purely judicial in the sense of the constitution, was yet quasi-judicial — judicial enough to permit the issue of the writ to the superintendent in a proper case. What was really meant by the opinion was that the act of the superintendent, from the point of view of the principle of the separation of governmental powers, was an administrative act of a discretionary character.[5] A very late case[6] in New York, finally, has accepted the Wisconsin point of view, practically reversing the case of People *vs.* Board of Health,[7] cited above. The court holds, though without citation of authorities, that an order of a board of health may be quashed on certiorari, because the duties discharged by boards of health are quasi-judicial.

[1] Preble *vs.* Portland, 45 Maine, 241.

[2] Ewing *vs.* City of St. Louis, 5 Wallace, 413.

[3] Flint *vs.* Fond du Lac, 42 Wis. 287.

[4] Gaertner *vs.* Fond du Lac, 34 Wis. 496.

[5] State *vs.* Whitford, 54 Wis. 150. Same principle: State *vs.* Dodge Co., 56 Wis. 79.

[6] People *vs.* Board of Health, 12 N. Y., Supplement, 561. [7] 20 How. Pr. 458.

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In view of the above decisions we may safely say, notwithstanding the difficulty experienced by the courts of some of our commonwealths in reaching a satisfactory solution of the question, that the use of the certiorari is not confined to the review of judicial acts; that the writ is applicable in numerous cases where private rights are prejudiced by administrative decisions; and that it furnishes the chief means of subjecting the acts of a host of administrative authorities to the control of the courts. In detail it has been held that certiorari lies to justices of the peace,[1] supervisors,[2] county commissioners,[3] commissioners to assess damages,[4] assessors,[5] commissioners of highways in many cases,[6] and municipal councils and departments.[7]

Not only may certiorari be employed to review administrative decisions, but there is a tendency to limit its use to such cases. At common law certiorari was used to review the decisions of bodies exercising real judicial powers, *i.e.* bodies which decide controversies;[8] but at the present time in the United States the tendency is to provide some other means of appeal against the action of purely judicial bodies and to confine certiorari — *i.e.* certiorari to review a determination — to the action of bodies mainly administrative in character. Thus the New York codes of civil and criminal procedure abolish certiorari to review a determination in a civil or criminal action by a judge or a court of

[1] Rex *vs.* Inhabitants of Glamorganshire, 1 Ld. Raymond, 580; Little *vs.* Cochran, 24 Me. 509.

[2] People *vs.* Supervisors, 51 N. Y. 442.

[3] Bangor *vs.* County Commissioners, 30 Me. 270; Gibbs *vs.* Hampden, 19 Pickering, 298.

[4] *Ex parte* N. J. R.R. Co., 16 N. J. L. 393.

[5] People *vs.* Assessors of Albany, 40 N. Y. 154.

[6] Commonwealth *vs.* Coombs, 2 Mass. 489; Lawton *vs.* Commissioners, 2 Caines (N. Y.) 179.

[7] Stone *vs.* Boston, 2 Metc. 220; Camden *vs.* Mulford, 26 N. J. L. 49; People *vs.* Mayor, &c., 9 Barb. 535; People *vs.* Rochester, 21 Barb. 656 (this case shows a tendency to depart from the original New York rule); Whitney *vs.* Board of Delegates, 14 Cal. 479.

[8] *E.g.* see Bacon's Abridgment, title Certiorari, B. Reardon *vs.* Guy, 2 Hayward (N. C.) 433; John, a Slave *vs.* The State, 1 Ala. 95; *Ex parte* Couch, 14 Ark. 337.

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record, and provide for an appeal.[1] In New York, accordingly, certiorari to review a determination has been specialized into a means of appeal against the action of administrative officers — the very purpose for which the courts at first refused to employ it.

Nevertheless, the writ cannot be used against all officers of the administration. It may not be employed to review the decision of a mere ministerial officer [2] nor the acts of the chief executive of the nation or of a commonwealth.[3]

V. *Province of the Writ.*

The change above outlined in the use of the writ has carried with it a change in its purpose or province. In order to understand the province of the certiorari to review a determination, it is necessary to bear in mind the rules of the English law regarding appellate proceedings in general; and first of all the distinction between appellate proceedings at law and in equity. Equitable appellate proceedings, such as "appeals" technically so called and "review," brought up before the appellate court the whole matter in controversy, including questions both of law and of fact, to be tried anew as if the case had never been tried before. Appellate proceedings in law, as distinguished from equity, consisted of the writs of error and certiorari, and brought up for review only questions of law. Among the questions of law upon which appeal might be taken was the question as to the existence in the proceedings of those facts which the law requires to exist in every case in order that there may be no error in law; such, for example, as the fact that the defendant in the suit had been served with process.[4] The historic basis of this distinction between appellate proceedings at law and in equity is probably to be found in the fact that, at the time when the jurisdiction of the royal law courts was developed, the influ-

[1] N. Y. Code of Civil Procedure, sec. 2121; N. Y. Code of Criminal Procedure, sec. 515. See also, on the general principle, Baylies' New Trials and Appeals, p. 17.

[2] People *vs.* Walter, 68 N. Y. 403, 410.

[3] People *vs.* Hill, 13 N. Y. Supplement, 186; *Law Journal*, April 13, 1891; affirmed by the Court of Appeals but not yet reported.

[4] Powell, Appellate Proceedings, pp. 44 *seq.*

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ence of the popular courts was stronger than at the time of the development of the court of Chancery. In the popular courts questions of law and of fact were both decided by the people. With the development of the royal law courts, the decision of questions of law fell into the hands of the judges, but the decision of questions of fact was left with the representatives of the people, or, later, the jurors. But when the court of Chancery was formed, the balance of influence had so far shifted from people to King that the King was able to invest the Chancery judges with power to decide all questions, whether of law or of fact. Appeals in both cases naturally brought up only those questions which had been decided by the judges from whose decision the appeal was taken: in the one case, only questions of law; in the other, questions both of law and of fact. Certiorari and error were therefore from the beginning means of appealing upon questions of law alone.

The great difference between the writ of certiorari and the writ of error was that the writ of error was issued to tribunals having full common-law jurisdiction, courts which decided controversies; while certiorari was issued to tribunals not acting in accordance with the common law, *i.e.* tribunals of limited jurisdiction — jurisdiction granted by statute and largely administrative in character.[1] This fact had great influence on the original province of the writ of certiorari to review a determination. The most important authorities to whom the writ was originally issued (*viz.* the justices of the peace) did not so much decide controversies as administer government. Their most important duties, the exercise of which the court of King's Bench was most frequently called upon to review on certiorari, consisted in deciding questions of fact and expediency. Unlike the courts of general common-law jurisdiction, they had not to establish and develop the rules of the substantive law; they had simply to apply the established rules to what they found to be the facts of each case. Of course the application of legal rules involves their interpretation, and, equally of course, it was possible for these courts to misinterpret the substantive law;

[1] See *supra*, p. 505.

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but the main questions of law which they determined (and had to determine in order to act at all) concerned their competence, and their most frequent errors on points of law consisted in overstepping their competence, *i.e.* in excess of jurisdiction. Now in the theory of the English law the decision of a court of limited jurisdiction in excess of jurisdiction is absolutely void. In pure theory, therefore, there was no need of providing any means of appeal from such decisions in excess of jurisdiction; since they were void, they could always be impugned collaterally. In practice, however, it was clearly inconvenient to have the validity of a decision tested in this way. Not only would it be unfair to give to the individual no remedy except the right to refuse to obey the void order or decision and, on prosecution, to allege collaterally its illegality and invalidity,[1] but it would take up altogether too much of the time of the ordinary courts to oblige them to examine, whenever the claim of invalidity might be raised collaterally, whether all the provisions of the law giving jurisdiction had been complied with. Accordingly we find that from an early period the acts of the most important of these authorities of limited jurisdiction, not proceeding in accordance with the common law (*viz.* the justices of the peace), were treated collaterally in much the same way as the acts of the ordinary courts of common law and general jurisdiction. Thus, in the case of Rex *vs.* Venable[2] the court said: "We will not presume that they acted unlawfully." But if the collateral attack was refused, a means of direct attack must be furnished. Therefore from an early time the certiorari was made use of to quash an act that was admittedly void. The most instructive of the early cases on this point are those of Rex *vs.* Inhabitants of Glamorganshire,[3] known as the Cardiff Bridge case, and Groenwelt *vs.* Burwell.[4] In the first the question was as to the propriety of the issue of the certiorari to justices of the peace to

[1] *Cf.* Justinian's Codex, 2, 40, 5, 1: Melius . . . est intacta jura . . . servari quam post causam vulneratam remedium quaerere.

[2] 1 Strange, 630. See also Rex *vs.* Cleg, 1 Strange, 475, and note to 7 T. R. 633, where it was held that a conviction by a justice could not be impeached collaterally any more than the judgment of a court of general jurisdiction. *Cf.* Freeman, Judgments (3d ed.), secs. 122, 520. [3] 1 Ld. Raymond, 580. [4] *Ibid.* 454, 469.

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quash, for excess of jurisdiction, their action in ordering money to be levied for the repair of Cardiff bridge. Objection was made to the issue of the writ on the ground that it was not necessary; since if the justices had proceeded according to the statute there was no reason to remove their order into the royal court, but if not, then what they did was *coram non judice* and void and parties might examine the legality of the proceedings collaterally in an action. But the court held that it would examine the proceedings of all jurisdictions erected by act of Parliament; and if under pretence of such an act they proceeded to encroach jurisdiction to themselves greater than the act warranted, the court would send a certiorari to them to have their proceedings returned there, to the end that the court might see that they kept themselves within their jurisdiction and if they exceeded it to restrain them. In Groenwelt *vs.* Burwell it was said that by common law the court would examine by certiorari if other courts proceeding not in accordance with the common law exceeded their jurisdiction.[1] Thus, notwithstanding the general theory concerning void acts, the decision of the question of jurisdiction was originally the province of the writ of certiorari to review a determination; and the fact that the act to be reviewed was void was no bar to the issue of the writ. This rule seems to have been adopted in this country. Judge Savage of New York said: "There are many cases in our reports of justices' judgments reversed where they were utterly void."[2] Again, in Fitch *vs.* Commissioners,[3] the court said that the fact that an order is void does not preclude the party from treating it as voidable[4] and bringing certiorari to quash it.[5]

[1] See also Rex *vs.* Morley, 2 Burrows, 1040, where it is said that "a certiorari goes to see whether a limited jurisdiction have exceeded their bounds."

[2] Starr *vs.* Rochester, 6 Wendell, 564, 567. [3] 22 Wendell, 132, 135.

[4] The reasoning here is confused. The law may, and in fact every system of law does, provide in certain cases for a judicial declaration that a void act is void. This is the purpose of the French *action en nullité* and of the German *Nichtigkeitsklage*. The English law has inherited from the canon law a similar procedure in the case of a marriage void *ab initio*. The fact that a distinct form of procedure is provided to test the question of nullity does not turn the void act into a voidable act; and in such cases it is inexact and confusing to say even that the void act is "treated as voidable."

[5] See Stone *vs.* Mayor, *etc.*, 25 Wendell, 157, 168, with cases cited; Swann *vs.*

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Jurisdiction depends, however, according to the courts, upon the existence of two classes of facts. In the first place the law must have given the power to act in the case. In the second place the formalities laid down by the law must have been followed by the authority doing the act; and even if the law does not expressly indicate the formalities to be complied with, still the courts have always insisted upon the doing of certain things in order that the legal proceedings may be regarded as valid. In other words the proceedings must be regular, in order that an authority may be said to have acted within its jurisdiction. The question of regularity of proceedings is thus made a part of the general question of jurisdiction. Still, many of the decisions, among which may be mentioned not a few of those above cited,[1] treat this latter question as a distinct one, and state that certiorari brings up not only the question of jurisdiction, but also that of the regularity of the proceedings.[2] But this was all that the certiorari originally brought up for review. Case after case may be cited to indicate how unwilling the courts were to allow any other questions than those pertaining to the matter of jurisdiction to come up before them on certiorari. They refused for a long time to consider errors upon points of law except where these affected the question of jurisdiction.[3] They have time and time again refused to look beyond the record;[4] they have decided that, when the case brought up turned upon the decision of a question of fact, they would not interfere,[5] — would

Mayor, 8 Gill (Md.) 150; Doolittle *vs.* R. R. Co. 14 Ill. 381; People *vs.* Williamson, 13 Ill. 660; R. R. Co. *vs.* Whipple, 22 Ill. 105; Jeffers *vs.* Brookfield, 1 N. J. L. 38, and *Ex parte* Buckner *et al.*, 9 Ark. 73. In both these last cases the court speaks expressly of quashing void acts.

[1] See particularly Brooklyn *vs.* Patchen, 8 Wendell, 47; Swan *vs.* Mayor, 8 Gill (Md.) 150.

[2] The most common irregularity seems to be failure to give proper notice. This, the courts hold, is sufficient cause to quash the action of administrative authorities on the ground of common right. Fonda *vs.* Canal Appraisers, 1 Wendell, 288; 15 Johnson, 537; Commissioners *vs.* Chase, 2 Mass. 270; Commissioners *vs.* Peters, 3 Mass. 229; State *vs.* Barnes, 8 Me. 135, 137; Ottawa *vs.* R. R. Co., 25 Ill. 43.

[3] King *vs.* Whitbread, 2 Douglas, 549, 553, 555; Birdsall *vs.* Phillips, 17 Wendell, 464.

[4] Wood *vs.* Tallmann, 1 N. J. L. 153; Starr *vs.* Rochester, 6 Wendell, 564, 566; Farley *vs.* McIntire, 13 N. J. L. 190; Andrews *vs.* Andrews, 14 N. J. L. 141.

[5] State *vs.* Senft, 2 Hill (S. C.) 367, 369.

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not inquire whether a verdict or decision was against evidence,[1] nor consider the credibility of witnesses.[2] On this account the return to the writ when issued did not bring up the evidence as a part of the record.[3] The only clear exception to this limitation of the province of the writ was to be found in the case of summary convictions before justices, where the courts held that errors of law other than those on the question of jurisdiction were reviewable; that the question of fact, whether the conviction was supported by the evidence, might be examined; and that, in case the courts of review found that the conviction was totally unsupported by the evidence, they might quash it.[4] The reason of this exception is to be found in the necessity of establishing an effective control by officers of a really judicial character in cases involving individual liberty. The justices, as we have seen, were administrative rather than judicial officers; and in these cases of summary convictions the justices acted without a jury and in a manner which was at variance with the usual rules of the English criminal law relative to convictions. In these cases of summary conviction, where the province of certiorari was wider than in other cases, — where it served to review both the law applied and the evidence adduced, — the usual rule was to send up to the court of review the evidence as well as the record.

Further, there are a few English cases which apply the same rule to facts affecting the jurisdiction. A series of cases have held that the action of justices who were in the slightest degree interested might be quashed on certiorari. In fact one of the fundamental rules in regard to jurisdiction has always been that *aliquis non debet esse judex in propria sua causa.*[5] In some of these cases the interest which forfeited jurisdiction had to be

[1] Nightingale, petitioner, 11 Pickering, 168; Baldwin *vs.* Simmons, 9 N. J. L. 196.

[2] Independence *vs.* Bompton, 9 N. J. L. 209.

[3] Canal Co. *vs.* Keiser, 19 Pa. St. 134.

[4] King *vs.* Smith, 8 T. R. 588; Rex *vs.* Killett, 4 Burrows, 2063; Rex *vs.* Vipont, 2 Burrows, 1165; Rex *vs.* Theed, 2 Strange, 919; People *vs.* Miller, 14 Johns. 371.

[5] See, *e.g.*, *In re* Hopkins, E. B. & E. 100; Regina *vs.* Allen, L. R. 1 Q. B. 120.

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proved *dehors* the record. Thus a conviction for violation of the by-law of a railway company was quashed because some of the justices were shareholders in the company.[1]

The tendency in this country to separate the administration of justice from the administration of government has resulted in making the justices of the peace almost exclusively judicial officers. Their original judicial powers, which were mainly of a criminal character, have been increased by statutes which have given them quite an extensive jurisdiction in minor civil cases. But as they retained the character of courts of limited jurisdiction, not proceeding according to the common law, their acts were reviewed not by writ of error but by certiorari; and as the questions which could be reviewed on certiorari were, as has been shown, simply the questions of jurisdiction and regularity of proceedings, their mistakes of law in civil suits could not be corrected without extending the province of the certiorari and making it as liberal as the writ of error.[2] Such an extension of the province of the writ accordingly appeared in these civil cases. It seems to have gone hand in hand with the extension of the civil jurisdiction of the justices, and to have been accomplished by the courts almost unconsciously. Thus a judgment of justices of the peace in a civil case in Maine was quashed on certiorari because the justices had not required the debtor to make a full discharge of his property as required by law.[3] Here the ground of the quashing of the judgment, as stated by the court, was that after refusing the just demand of the creditor the justices' subsequent action was not warranted by law and they therefore had not jurisdiction. In another case the judgment of the justices was quashed on certiorari because they had refused to allow the creditor to make an examination of a debtor which the law permitted.[4] In spite of some conflict

[1] Regina *vs.* Allen, L. R. 1 Q. B. 120. See also People *vs.* Goodwin, 9 N. Y. 568; People *vs.* Wheeler, 2 N. Y. 82.

[2] The province of the writ of error was enlarged in the time of Edward I.

[3] Dow *et al. vs.* True *et al.*, 19 Me. 46.

[4] Little *vs.* Cochran, 24 Me. 509. See also on this point State *vs.* Stuart, 6 Strohbart L. (S. C.) 29; Hayward, petitioner, 10 Pickering, 358; Buckmesser *vs.* Dubs, 5 Binney (Pa.) 29.

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in the decisions,[1] the same rule has been established in New York. It has been decided that, in purely civil cases — *i.e.* in controversies between individuals in regard to purely private rights — the court of review may on certiorari quash the action of the lower tribunal, not only where it has exceeded its jurisdiction or where its proceedings have been irregular, but also where it has made a mistake in the application of principles of law to the particular case; and that, in order to enable the court of review to do this, the lower court must on the return to the writ send up whatever evidence is necessary to enable the higher court to reach its decision. These principles may be regarded as settled by the case of Morewood *vs.* Hollister,[2] decided in 1852, in which all the other cases were reviewed and the doctrine as stated — *viz.* that the court of review may quash the act of the lower court for error in law — was fully and unqualifiedly adopted. But the case of Morewood *vs.* Hollister went a step farther. It decided to apply in these cases the rule which had from time immemorial been applied to cases of summary convictions; *viz.* that the court of review might quash the decision of the lower tribunal if this decision appeared to be absolutely unsupported by the evidence. In the case at bar it decided, on the evidence which it permitted to be sent up, that the lower court had erred in deciding "that the insolvent had in all things conformed to the matters required of him by statute and that he should be discharged from his debts."

Up to the time when this case was decided (1852) we find few if any decisions enlarging the province of the writ when applied to the decisions of administrative as distinguished from judicial authorities. One case, indeed, had claimed for the court of review the right of quashing the decisions of administrative authorities for errors of law. This was the case of Baldwin *vs.* Calkins,[3] in which the court quashed the act of assessment com-

[1] Matter of Wrigley, 4 Wendell, 602, and 8 Wendell, 134; Anderson *vs.* Prindle, 23 Wendell, 616. See also Roach *vs.* Cosine, 9 Wendell, 227; Brown *vs.* Betts, 13 Wendell, 29 (which permitted the introduction of evidence and discussed its weight); Brooklyn *vs.* Patchen, 8 Wendell, 47. But see Simpson *vs.* Rhinelander, 20 Wendell, 103 which held to the old view.

[2] 6 N. Y. 309.

[3] 10 Wendell, 167.

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missioners on the ground that in assessing damages they had made use of a wrong principle of law. But in People *vs.* Goodwin,[1] the contrary view was taken. It was said that

> where the authority and jurisdiction depends upon a fact to be proved . . . . and such fact is disputed, the magistrate must certify the proofs given in relation to it for the purpose of enabling the higher court to determine whether the fact be established. The decision of the magistrate in relation to all other facts is final and conclusive and will not be reviewed on a common law certiorari. But the main object of this writ being to confine the action of inferior officers within the limits of these delegated powers, the reviewing court must necessarily re-examine, if required, the decision of the magistrate on all questions on which his jurisdiction depends, whether of law or of fact.

The disputed jurisdictional fact in this case was whether the owner of a building situated on land through which a road was to run had given his consent to the laying out of the road as fixed by the commissioners, the consent being necessary to the jurisdiction of the commissioners. While the statement of the principle in this case is quite narrow, it will be noticed that the decision itself is quite in line with the decisions discussed in the preceding paragraph. A similar case is People *vs.* Van Alstyne,[2] where facts in regard to jurisdiction were permitted to be brought up on certiorari. The more liberal principle, however, was not yet established, as may be seen from the next case in point, *viz.* People *vs.* Wheeler.[3] This held that the

> main inquiry on certiorari relates to the power and jurisdiction of the inferior tribunal, and the question can only be determined by matters appearing in the record. When an examination into collateral facts, not properly appearing in the record, is desired, to show want of power or jurisdiction, the appropriate remedy is not by certiorari.

In this case the attempt was made to show *dehors* the record that the officer whose decision was attacked was the brother of one of the parties concerned in the proceeding. This the court refused to allow, notwithstanding that it was claimed that proof of the relationship, if admissible, would have an important bearing on the question of jurisdiction. This claim was not

[1] 5 N. Y. 568. [2] 32 Barb. 131. [3] 21 N. Y. 82.

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fully admitted by the court. The next case is still stronger in favor of the narrow rule. This is the case of People *vs.* Highway Commissioners,[1] in which the court says distinctly that the office of certiorari

> is merely to bring up the record of the proceeding to enable the Supreme Court to determine whether the inferior tribunal has proceeded within its jurisdiction and not to correct mere errors in the course of the proceeding. Here the object seems to bring into review the alleged erroneous rulings of the jury in receiving or rejecting evidence offered on the hearing before them, as though it were a bill of exceptions. Such questions do not arise and cannot be reviewed on certiorari.

The opinion is based on the case of Birdsall *vs.* Phillips[2] which was one of the narrowest of the old cases and had been reversed so far as the purely civil cases were concerned.

But the application of the broader rule to the decisions of judicial bodies could not fail to have an influence upon the courts in their review of the decisions of administrative authorities. The first case, however, which comes out definitely for the application of the same rule to administrative decisions is Swift *vs.* Poughkeepsie,[3] which contains, in a dictum, a distinctly liberal statement of the province of the writ. This was an action against a city to recover taxes paid, on the ground that the assessment was erroneous. The court held that the action did not lie. The acts of the assessors could not thus be impeached collaterally. The plaintiff, it was said, should have availed himself of his remedy by certiorari to declare the assessment void. The judge says:

> The plaintiff denies the efficiency of this remedy upon the ground that upon a certiorari the court will only consider the question of jurisdiction, and that in this case if the court found, as it would upon the doctrine now proclaimed, that the assessors had jurisdiction, their determination as to the legality of the taxes could not have been reviewed. It is true that this has been the doctrine of the courts to a considerable extent, upon what ground, either of principle or of necessity, I never could very clearly comprehend. But I think, at this time a more liberal rule would and should be applied; and that a certiorari

[1] 30 N. Y. 72. [2] 17 Wendell, 464. [3] 37 N. Y. 511.

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would not bring the naked question of jurisdiction, but the evidence on which the body acted to which the writ was directed as well as the ground or principle of their action, and thus present the whole case for review and if necessary for correction.[1]

While such expressions of opinion as this have not the authority of decided cases, still they show the leaning of the courts; and shortly afterwards we find a case which definitely applies to the decisions of administrative bodies the same rule which had been worked out previously with so great trouble and through so much conflict for the decisions of purely judicial bodies. This was the case of People *vs.* Board of Police,[2] which decided that the court might review the decision of a board of police dismissing a policeman from office, and might reverse the decision if it was, in the opinion of the court, absolutely unsupported by the evidence. Judge Woodruff says:

I cannot resist the belief that a disposition has been manifested to limit the office of this most useful writ within too narrow limits. Let it once be established that where an officer or board of officers have jurisdiction of the subject or of the persons to be affected and proceed in its exercise according to the prescribed mode or forms, their determination is final and beyond the reach of any review, whatever errors in law they may commit and however clear it may be upon undisputed facts that their judgment, decision or order is not warranted — and there is danger that much injustice and wrong may happen without possibility of redress. . . . It may be desirable not to multiply cases in which appellate courts can be called upon to interfere in matters of small importance, but that furnishes no reason for denying the power to see that the rules of law are not violated, when wrong is done, and no great public inconvenience will result from its exercise. I conclude . . . that on this appeal this court have power to examine the case upon the whole of the evidence to see whether, as a matter of law, there was any proof which would warrant a conviction. . . . If there was no evidence . . . if the case were such at the close of the trial that it would have been erroneous to submit the question to a jury, were a like question before a jury in an ordinary action — then the error is an error of

[1] See also, to the same effect, Baldwin *vs.* Buffalo, 35 N. Y. 380, which makes the same intimation and which is approved in the case just cited. The case of Baldwin *vs.* Buffalo also intimated that if the evidence returned showed that the decision of the lower tribunal was incorrect, *i.e.* was absolutely unsupported by the evidence, that the higher court could correct it.

[2] 39 N. Y. 506.

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law, and the conviction is illegal; it rests upon no finding of facts upon evidence tending to sustain such finding; but as matter of law the relator was entitled to be acquitted of the charge [page 517].

This liberal rule was followed in the case of People *vs.* Assessors,[1] and in People *vs.* Smith,[2] decided in 1871. In this last case Judge Grover says:

> Whatever may have been the conflict of authority upon the question whether, upon a common-law certiorari, the court can inquire into anything beyond the jurisdiction of the tribunal over the parties and subject matter, it must now be regarded as settled in this state, that it is the duty of the court in addition thereto to examine the evidence and determine whether there was competent proof of facts necessary to authorize the adjudication made, and whether in making it any rule of law affecting the rights of the parties has been violated [page 776].

Such is the history of the development of the office of the writ of certiorari, as taken particularly from the cases decided by the courts of New York. It may well be asked why the courts so long distinguished between the province of the writ as a means of reviewing the decisions of purely judicial bodies and its province as a means of reviewing the decisions of administrative bodies, and why the courts enlarged the province of the writ in the one case without enlarging it in the other. The answer is that the ordinary civil jurisdiction given to tribunals not acting in accordance with the common law, *i.e.* to courts of limited jurisdiction, was given as a result of the separation of judicial from administrative functions; that the writ of certiorari had always been chiefly used in administrative cases, since administrative cases formed the majority of the cases which were decided by these courts of limited jurisdiction; that with the transfer to them of more purely judicial duties the need was felt of reviewing their decisions on such matters, and a method of appeal had to be provided which should accomplish the same results as the writ of error in judicial cases, and the certiorari in the case of summary convictions. Finally, in most of the cases in which judicial duties were conferred upon these courts

[1] 40 N. Y. 154. [2] 45 N. Y. 772.

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of limited jurisdiction, the statutes granting the jurisdiction provided expressly for an appeal from their decisions by certiorari; and the wording of the statutes was such that the courts felt justified in applying to this "statutory certiorari," as they called it, rules more liberal than those which had been established touching the common-law certiorari. This comes out quite clearly in the case of Morewood *vs.* Hollister.[1] The statute granting the certiorari in this instance provided for a review of the "proceedings." This word the court interpreted to mean "all matters connected with or attending the exercise of the power which are necessary to enable the court of review to determine its validity or correctness." The more liberal rule once established with regard to this statutory certiorari, it was an easy matter to liberalize the office of the common-law certiorari. And fortunate it was for individual rights that this means of development was offered to the courts before the certiorari was confined, as it is now coming to be, to the review of the decisions of purely administrative tribunals. For we are justified in concluding, from the difficulty which the courts found in enlarging the province of the common-law certiorari even with the aid of the statutory certiorari, that without it the certiorari would have remained, in New York at any rate, as narrow a remedy as it was under the common law.

While New York had thus the greatest difficulty in enlarging the province of the writ, New Jersey, it would seem, took a much more liberal view of its use from the beginning. As early as 1839 we find the New Jersey courts holding that the proceedings of administrative bodies might be quashed on certiorari for an erroneous application of principles of law.[2]

The broader rule as to the province of the certiorari, which had been so laboriously evolved by the New York courts and which offered to individual rights so important protection against the arbitrary action of the administration, the people of New York decided to sanction by statute; in order, in the words of Mr. Throop,[3] "to prevent the possibility of re-opening the ques-

[1] 6 N. Y. 309. [2] N. J. R. R. Co. *vs.* Suydam, 2 Harrison, 25.
[3] In his note to sec. 2140 of the New York Code of Civil Procedure.

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tions thus decided,[1] and to declare definitely that the cases holding the other way were obsolete." Section 2140 of the code, which is simply declaratory of the New York common law as then understood, provides that in addition to the questions of jurisdiction, regularity of proceedings and errors of law, the court may decide whether there was any competent proof of all facts necessary to be proved in order to authorize the making of the determination; and, if there was such proof, whether there is upon all the evidence such a preponderance of proof against the existence of any of the facts that the verdict of a jury in affirmation thereof, rendered in an action in the Supreme Court triable by jury, would be set aside by the court as against the weight of evidence. The meaning of this section is shown to be identical with the common-law rule adopted before the passage of this section, by the cases of People *ex rel.* Hogan *vs.* French,[2] and People *ex rel.* McAleer *vs.* French,[3] which hold that the Supreme Court may reverse the decision of the subordinate tribunal only where it is absolutely unsupported by proof. If there is any proof at all to support the decision it will be upheld, as the court will not determine the preponderance of proof.

The New York rule as to the province of certiorari has been adopted in Michigan in People *vs.* Jackson.[4] Judge Cooley, who rendered the opinion of the court, seems to think that in permitting errors of law outside of jurisdictional questions to be reviewed on certiorari the court is not extending at all the province of the writ of certiorari at common law. He regards the early rule in New York, in accordance with which only the record was returned and only jurisdictional questions considered, as not supported by the early English cases; and in order to show that evidence *dehors* the record might originally be returned he cites a series of cases. Most of these on examination turn out to be cases in which summary convictions were being examined; and it will be remembered that in these cases

[1] *I.e.* by People *vs.* Smith, 45 N. Y. 772, the last case on the point before the passage of this section.

[2] 119 N. Y. 493. [3] 119 N. Y. 502.

[4] 9 Mich. 111, followed in Hyde *vs.* Nelson, 11 Mich. 353, 357.

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the New York practice was to require the return of the evidence and to quash the conviction if not supported by the evidence. The only cases cited by Judge Cooley which do not relate to summary convictions and which are in point simply prove that on certiorari jurisdictional facts should be returned and considered — which was the rule in New York, as is shown by the case of People *vs.* Goodwin.[1] That in England the purpose of the certiorari was not to correct mistakes of law may be seen from the decision in the case of King *vs.* Justices,[2] where the court held the contrary view and where Lord Tenterden said :

> The late decisions establish, however, that we cannot assume to ourselves the jurisdiction of a court of error and revise the judgments of the court of Quarter Sessions. . . . Assuming the judgment to be erroneous, I think we have not jurisdiction as a court of error to review it.

Judge Cooley further argues that the old English rule must have been the liberal one from the fact that in those cases where the statute has shut out the certiorari, which of late years are very common, the court may still issue it to review the question of jurisdiction. This is undoubtedly true. But it must be remembered that from the beginning the purpose of the writ of certiorari was to review the regularity or irregularity of proceedings as well as the naked fact of jurisdiction ; and this question of regularity of proceedings is really what the various statutes forbidding certiorari have shut out from review. This may be seen from the case of *Ex parte* Hopwood,[3] in which the judge says :

> The certiorari is taken away, so we cannot interfere unless they [the justices] have acted altogether without jurisdiction. . . . But the question now is whether we can review the mode in which they have exercised their jurisdiction.

The point decided in the case was that the mode in which the subordinate tribunal had exercised its jurisdiction could not be reviewed.

[1] 5 N. Y. 568. [2] 8 Barn. & Cress. 137. [3] 15 Ad. & El. N. S. 121.

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The liberal New York rule has been adopted also in Wisconsin. This has been done partly by statute, providing for a statutory certiorari or an appeal from the judicial acts of the justices; and partly by judicial decision, as regards proceedings of a summary character and out of the course of the common law, *i.e.* administrative decisions. The case of Iron Co. *vs.* Schubel, Town Clerk,[1] decided in 1872, holds that mistakes and errors of law may be corrected on certiorari.[2]

The better rule at the present time, as derived from these decisions, is that the province of the writ of certiorari is to quash the decision of a subordinate administrative tribunal: first, because it has exceeded its jurisdiction; second, because it has not followed the formalities required by law; and third, because it has made an error in the application of a principle of law to the case at bar — among which errors of law is to be included the finding of a fact unsupported by evidence. And to the end that the court of review may decide these points, it is necessary that the lower court send up in addition to the mere record all facts which are material, especially the evidence.

But this liberalizing of the old rule does not mean that the courts will control by means of certiorari the discretion of the subordinate tribunal whose acts are reviewed. The courts do not allow the subordinate tribunal so to make use of its discretion as to come to a decision which is absolutely unsupported by evidence; but so long as its discretion is not thus abused, the courts as a general rule will refuse to control it in any way. One of the first cases in New York which attempted to enlarge the province of the writ[3] held that, while the decision of the lower authority might be quashed on the ground that it had applied a wrong principle of law, — in this case it had assessed damages on a wrong principle, — still the assessment of damages as to amount by the lower authority was absolutely conclusive and could not be changed by the court on certiorari. A

[1] 29 Wisc. 444.
[2] See also State *vs.* Supervisors, 24 Wisc. 286; State *vs.* Whitford, 54 Wisc. 150.
[3] Baldwin *vs.* Calkins, 10 Wendell, 167.

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similar principle was laid down in a considerably later case,[1] where it was said that the justice or injustice of an assessment for local improvements could not be examined on certiorari. The same principle, *viz.* that the discretion of lower authorities may not be controlled by the courts on certiorari, has been established in other commonwealths. In the case of Hayward, Petitioner,[2] the court, although it permitted the evidence to come before it in order that it might ascertain whether a correct principle of law had been applied, said that it would not reverse the decision of the justices on the ground that the evidence did not warrant such a decision; since "that was a matter submitted by the statute to their judgment, and we cannot revise their decision upon it." In the case of Borough of Sewickly,[3] the court held that the soundness of the discretion of an authority in incorporating a borough is not subject to review on certiorari. In Commissioners' Court *vs.* Banne,[4] it was declared that "upon the question of the expediency of opening or altering a public road the commissioners' court exercises a quasi-legislative power and its decision is not reviewable." The same principle has been applied by the courts of New York to the question of the assessment of property for purposes of taxation.[5] In the case of People *vs.* Trustees[6] Judge Earle said:

> The statute makes them [the assessors] the judges of the value of the property for the purposes of taxation. They are required to exercise their judgment as to its value, notwithstanding any proof that may be produced before them, and the case would be a very extraordinary one which would authorize the Supreme Court upon certiorari to review their judgment. Indeed, it would be quite impracticable in most cases for the Supreme Court upon certiorari to correct the judgment of the assessors as to value, and my attention has been called to no such case.

It is pretty clearly the rule, therefore, that the courts will not on certiorari control the discretion of subordinate authorities. But for various reasons this rule has become unsatisfactory to

[1] People *vs.* Brooklyn, 4 N. Y. 419 (1851). See also Le Roy *vs.* Mayor, 20 Johns. 430.

[2] 10 Pickering, 358. [3] 2 Grant's Cases (Pa.) 135. [4] 34 Ala. 464.

[5] For the general principle as to assessments see Cooley, Taxation (2d ed.), p. 757. [6] 48 N. Y. 390.

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the individuals whose interests are affected by these discretionary administrative decisions. The chief cause of dissatisfaction is to be found in the great number and relative irresponsibility of the administrative authorities that have sprung up in this country as a result of the separation of the administration of government from the administration of justice. Under the old English system most of the really important administrative duties were discharged either directly by, or under the supervision of, the justices of the peace, who had obtained a well-recognized position as judges and who, from the manner of their choice and from the high social position they occupied, commanded the respect of the people and offered guarantees for impartial and wise administration. Under the new system, which has established a host of smaller and less important offices with no permanence of tenure, the same confidence has not been felt in their wisdom and impartiality. Under the old system no special need was felt for the extension of the province of the writ so that it might control the discretion of the justices. Under the new system, however, there has been felt a need of controlling the less wise and more arbitrary action of subordinate administrative officers. For individual rights may be violated as well by misconception of facts and indiscretion in action as by an excess of jurisdiction or a wrongful application of the law.

A further reason for dissatisfaction is found in the fact that there has never been in this country any tribunal to which appeals might be taken from the decisions of administrative authorities as to questions of discretion and expediency. In England the Star Chamber of the Privy Council and, after its abolition, the court of Quarter Sessions in each county constituted a sort of administrative court, with power to review the discretionary decisions of administrative authorities. In this country we have never been able, except in rare cases, to develop any administrative jurisdiction — *i.e.* any judicial control over the acts of administrative authorities — except that which is to be found in the power of the courts to issue certiorari and other writs of a similar character, *e.g.* mandamus, quo warranto, prohibition and injunction. This is the only

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relief which our system of administration offers to the individual whose rights have been injured by administrative decisions.

We find, accordingly, some indications of a tendency to extend the province of certiorari over discretionary decisions. In some cases the courts themselves, notwithstanding their usual conservatism, have felt obliged to relax the strictness of their rule; and in other cases the legislatures, finding that the courts were unwilling to give to the individual the relief demanded, have come to the rescue and have by statute enlarged the province of the writ so that the courts might on certiorari control the discretion of administrative authorities. This movement has just begun and has not as yet attained such dimensions as seriously to undermine the general rule. It is nevertheless worthy of careful examination.

In the first place, as I have said, the domain of administrative discretion has been invaded by the courts themselves. The courts have held in a series of cases that, where a statute provides that an officer may be removed from office for cause only, the courts have the right to control the discretion of the removing officer in deciding what is cause.[1] The courts, it is true, have not grounded their decisions on any desire to control the discretion of administrative officers, but on the proposition that the question, what is cause, is not a question of discretion but a question of law. But this does not alter the fact that, as a result of these decisions, the courts do exercise a control over the discretion of administrative officers — and that too upon a point where many think it necessary that the administration should possess full and unlimited discretion. There are besides a few other cases in which the courts — particularly those of New Jersey, which have taken in almost every respect a more liberal view of the province of the writ than the courts of other commonwealths — have exercised a direct control over the discretion of administrative authorities. Thus in the case of *Ex parte*

[1] Cases on this point are People *vs.* Board of Police, 72 N. Y. 415; People *vs.* Board of Fire Commissioners, 72 N. Y. 445; State *vs.* St. Louis, 90 Missouri, 19; Stockwell *vs.* Township Board, 22 Mich. 341. See also Kennard *vs.* Louisiana, 92 U. S. 480.

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New Jersey Railroad Co.,[1] it was held that the court might issue the writ to certain commissioners on the ground that the damages which they had assessed were excessive; while in Bellis *vs.* Phillips[2] the court intimated that it would interfere with the judgment of the lower court on the verdict of a jury if it were made plainly to appear that gross injustice had been done.

In the second place the legislatures have taken up the cause of the individual and have in several cases so enlarged the province of the certiorari as to force the courts through it to control the discretion of administrative authorities. The point in the administrative system of the United States where the need of some control over administrative discretion is most keenly felt is in the matter of assessments for purposes of taxation. There is no other place in the whole realm of administrative action where the interests of the individual come into so direct conflict with the administration, and there is no place where some remedy against unjust administrative decisions is more needed. But, as has been shown, the almost universal rule in this country is that administrative discretion in the assessment of property for taxes cannot be controlled on certiorari. To meet the desire for a remedy, some of our commonwealths have created a special statutory appeal to some court which commands the confidence of the people in a higher decree than do the assessors. In New York, however, the legislature has met this demand by enlarging the province of certiorari. By the laws of 1859, chapter 302, section 20, it was provided that a certiorari to review or correct on the merits any decision or action of the tax commissioners of New York city should be allowed by the Supreme Court on the petition of the party aggrieved. It is a significant fact that the granting of this remedy was coincident with the introduction of paid professional assessors in place of assessors elected by the people. In the year 1880 a similar provision was made for the entire state.[3] By the statute then passed a certiorari may issue from the Supreme Court on the petition of any person aggrieved by the assessment, and the court may examine the questions of the illegality of the assess-

[1] 16 N. J. L. 393. [2] 28 N. J. L. 125. [3] Laws of 1880, chap. 269.

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ment, its incorrectness by reason of overvaluation, and its unfairness by reason of inequality (*i.e.* because the assessment complained of is at a higher rate than assessments of other property on the same assessment roll). If the allegations shall on the return appear to be proven, the court may order such assessment, if illegal, to be stricken from the roll; if erroneous or unequal, it may correct it so as to make it fair and equal, or it may order a re-assessment. A somewhat similar provision has been made for the assessment of corporation taxes in New York.[1]

Similar provision for judicial control of the discretion of administrative officers is frequently made in the excise laws. Such was the case with the "substitute" excise bill lately before the New York legislature. But in these cases it is usually the discretion in refusing a license, not the discretion in granting one, that is subjected to judicial control.

As the purpose of certiorari was originally simply to quash the action of the subordinate tribunal, the effect of the decision of the court was usually to quash or to affirm the action appealed from. Several decisions, however, attempted to go further and in proper cases to modify or amend the determination.[2] Here again, in New York, the legislature has stepped in to aid the individual and has provided[3] that the court upon hearing may make a final order, annulling or confirming wholly or in part or modifying the determination reviewed as to any or all of the parties. The Court of Appeals has somewhat limited the application of this section by holding[4] that this section does not give the court the right to modify the discretionary decision within the jurisdiction of the lower authority. The facts in this case were that the Supreme Court amended an order of dismissal of the board of fire commissioners by substituting for dismissal suspension for six months. This, the Court of Appeals held, the Supreme Court was not justified by this section in doing.

[1] See Laws of 1885, chap. 501; Laws of 1889, chap. 463.
[2] See People *vs.* Ferris, 36 N. Y. 218. [3] Code of Civil Procedure, sec. 2141.
[4] People *vs.* Commissioners, 100 N. Y. 82.

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VI. *Conclusions.*

The most important results obtained from this study of the development of the writ of certiorari in this country may be summarized as follows:

(1) In order to meet the demands of a changed administrative system, the number of authorities to which the writ may issue has been greatly increased. In consequence, the writ has largely lost its character of an ordinary judicial appeal and is becoming rather a means of judicial control over administrative action.

(2) The province of the writ has been greatly enlarged, so that by its means errors of law may be corrected and decisions unsupported by the evidence may be quashed.

(3) The decisions of some of the courts and the statutes of several commonwealths show a tendency to subject the discretion of administrative authorities to the control of the courts.

That this development answers modern needs and is in accord with modern tendencies is shown by even a cursory glance at the means of judicial control over administrative action in foreign countries. The same impulse — namely, the desire to protect private rights against executive arbitrariness — which has occasioned this development of the certiorari in the United States, has brought about a considerable enlargement of the jurisdiction of the administrative courts of France and has led to the establishment of similar tribunals in Germany — tribunals all of which have sprung into existence since the middle of this century, and of which the most comprehensive date from the foundation of the German Empire. The problem is everywhere the same; but our solution differs in one important respect from that which has been adopted on the continent of Europe. There the more complete realization of the principle of the separation of governmental powers, — with its corollary, the independence of the administration over against the judiciary, — forced the publicists to find the means of judicial control over administrative actions in bodies not connected with the ordinary judiciary, and to construct, side by side with the ordinary

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courts, a second system of administrative courts. Here we have vested the control over the administration in the ordinary courts. Our solution of the problem differs again from that which has been reached in England. There an ample means of control has been found in the courts of Quarter Sessions and in the device of "stating a case" to the ordinary law courts. We, on the other hand, have gradually remodelled one of the old common-law writs and greatly widened its province.

If the same liberal ideas which have obtained in the immediate past continue to obtain in the future, it seems safe to predict that our present writs will prove amply sufficient to protect private rights from the abuse of administrative discretion, and that we shall find in our ordinary courts a more simple system of judicial control over administrative action than that which has been adopted on the continent of Europe.

FRANK J. GOODNOW.

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GENERAL BOOTH'S PANACEA.[1]

IT is wonderful what a fondness people still have for what Carlyle used to call "Morrison's Pills" — for cure-alls which promise to relieve them at once of almost every malady. It is true that the appetite for such marvels in the matter of medicine for the body is now mainly limited to "the lower classes"; but for social ailments, for diseases in society, the appetite for Morrison's wares has scarcely abated. Land-nationalization and Prohibition are both cases in point.

When one chances to make some such remark as this, it is usual to reply that, after all, it is very natural. Men who care strongly about any reform, or supposed reform, are sure to exaggerate its efficacy; fanaticism is a close companion of earnest belief. This is true enough; but it does not greatly improve the situation. It rightly suggests that we should take a charitable view of those who prescribe the pill; but it does not make the pill any the more efficacious. If there is anything that experience and science teach, it is that society is complex, its parts interconnected and its evolution gradual. To suppose that any one force or group or forces is going to completely change its character within a brief space of time, is utterly to misapprehend the nature of social problems.

The more we examine the "Scheme" presented to the British public and the world by General Booth at the end of last year, the more evident does it become that it is but another Morrison's Pill. The fashion of pills changes; and this last

[1] In Darkest England and the Way Out. By General BOOTH. Funk & Wagnalls, New York, 1890. — 385, xxxi pp.

An Examination of General Booth's Social Scheme, adopted by the Council of the London Charity Organisation Society. C. S. LOCH, Secretary. Second Edition. Swan Sonnenschein & Co., London, 1890. — 102 pp.

"In Darkest England" on the Wrong Track. By B. BOSANQUET, M.A. Swan Sonnenschein & Co., London, 1890. — 72 pp.

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remedy is not quite like the old ones. The skilful writer or writers who assisted General Booth to put his scheme into an attractive shape had learned this much at any rate — that one single measure could hardly be expected to remove all our troubles. They accordingly unroll a long list, a score or more, of plans and suggestions. This gives an air of completeness and reasonableness to the scheme which probably reassured the author, and has certainly impressed his readers. It seems the fairest thing in the world to say to the charitable public: "Here is plenty to choose from. If you don't like to subscribe to this, you can subscribe to that. You pay your money and you take your choice." Is it just, then, to liken it to Mr. Morrison's simple prescriptions? One cannot help thinking so, and that for the following reasons. In the first place, every part of the scheme is subordinate to one particular promise on the part of General Booth, *viz.*, that if he is given sufficient funds, he will bring it about that what he calls "the submerged tenth" shall all be set to work. In the second place, all other reforming agencies are disregarded or belittled. Moreover, all the measures suggested are to be attempted by the Salvation Army, and the Salvation Army alone. And finally, although in an occasional passage the writer of *In Darkest England* seems to invite help from outside in the execution of his plans, the book is practically an appeal to the public for money, and for nothing else. The new fashion of pill is no longer: "Pass this or that piece of legislation, and society will be regenerated." It is: "Put your money in the slot, and the machine will work. Send in your subscriptions, and the Salvation Army will do the rest."

There is a good deal in the advertisement of the pill, — that is to say in the book entitled *In Darkest England*, — which might have been expected to excite misgiving. Throughout there is an almost overpowering flavor of sensational journalism. Look, for example, at the story of an "out-of-work," "taken down from his own lips," with its picturesque transitions and adroit literary touches.[1] With the clever superficial journalist's style there is his wonted, yet astounding, ignorance. We might be

[1] Booth, pp. 33 *seq.* 59 *seq.*

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sure, for instance, that we should come across that conception of "the laws of political economy," which, long after it has been abandoned by all teachers of the science, still finds a home in Fleet Street; and we quickly find it,[1] with the usual display of virtuous indignation over the economist's hard-heartedness.

Another reason for distrust, quite apart from the character of General Booth's proposals in themselves, is the looseness and inconsistency of his statements as to the extent of the evils with which he proposes to deal. He "leaves to others," he says, "the formulation of ambitious programmes for the reconstruction of our entire social system."[2] All he aims at is to "save"[3] (in the sense of providing food, shelter and work for) "three million men, women and children,"[4] a "submerged tenth" of the population of Great Britain. This estimate, he declares, will be found lower than that of any other writer; it is the minimum that can be reasonably asserted; if it errs at all, it is in the direction of excessive "sobriety."[5] He bases it on the figures of Mr. Charles Booth — *not* a member of the Salvation Army hierarchy, it may be well to state, but the author of the remarkable volume on *East London* which was commented on in the POLITICAL SCIENCE QUARTERLY for September, 1890. He does indeed reproduce Mr. Booth's figures,[6] but with this significant change, that he alters the descriptive epithets for others each a shade darker: thus "Very poor, class A" becomes "Homeless"; "Very poor, class B" becomes "Starving"; and "Poor" becomes "Very poor." Some excuse may possibly be offered for this. It was pointed out, in the article just referred to,[7] that Mr. Booth's summaries of his own results were somewhat too optimistic for the evidence. General Booth may, therefore, have thought himself justified in using stronger terms than his authority. But what he was not justified in doing was in making this change without distinctly calling the reader's attention to it. Even if we pardon this use of his material, General Booth's figures are open to a good deal of criticism; and this they have received from Mr. Bosanquet and

[1] Booth, pp. 36, 43. [2] *Ibid.* p. 17. [3] *Ibid.* p. 23. [4] *Ibid.* p. 20.
[5] *Ibid.* p. 83. [6] *Ibid.* p. 21. [7] POLITICAL SCIENCE QUARTERLY, V, 509.

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Mr. Loch.[1] The latter arrives at the conclusion that "though General Booth proposes to deal with a submerged tenth, by no possibility can the question now before him be the treatment of more than a submerged seventy-seventh."[2] But the underlying cause of all the exaggerations, inconsistencies, discrepancies and other defects in his estimates is to be found in a fact to which sufficient attention has hardly been directed. It is that General Booth is himself very much at sea as to the classes he is going to save, and constantly shifts his own point of view. Sometimes it is the homeless, the starving, the out-of-work and the criminal classes, in the ordinary sense of those terms:

> What, then, is Darkest England? For whom do we claim that urgency. . . . I claim it for the Lost, for the Outcast, for the Disinherited of the World. These, it may be said, are but phrases. Who are the Lost? I reply, not in a religious but in a social sense, the Lost are *those who have gone under*, who have lost their foothold in society, those to whom the prayer to our Heavenly Father "Give us day by day our daily bread" is either unfulfilled, or only fulfilled by the Devil's agency; by the earnings of vice, the proceeds of crime, or the contribution enforced by the threat of the law [page 18].
>
> Darkest England may be described as consisting broadly of three circles, one within the other. The outer and *widest* circle is inhabited by *the starving and the homeless*, but honest, Poor; the second by those who live by Vice; and the third and innermost region at the centre is peopled by those who exist by Crime [page 24].

At other times he includes the whole of the casual laborer class, as well as the sweated workers in "domestic" industries.

> To these [houseless, starving, prisoners and indoor paupers] must be added, at the very best, a million, representing those dependent upon the criminal, lunatic and other classes, . . . and *the more or less helpless of the class immediately above the houseless and starving* [page 22].

Still more noteworthy is a passage in which he meets the objection that the men who come to his "Refuges" will not be amenable to discipline.

> Discipline, and that of the most merciless description, is enforced on multitudes of *these people* even now. Nothing that the most authorita-

[1] Bosanquet, pp. 40–44; Loch, pp. 35–46. [2] Loch, p. 45.

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tive organization . . . could devise . . . could for a moment compare with *the slavery enforced to-day in the dens of the sweater*. . . . There is no discipline so brutal as that of the sweater; there is no slavery so relentless as that *from which we seek to deliver* the victims [page 266].

It is, indeed, only by reckoning in these that he can make up his "tenth." But, if he includes them, much of his language — such as "living in little short of perpetual misery," "a vast despairing multitude," "the residuum" and the like — is misleading. What is still more important is that, if this is what he means, he *is* embarking, in spite of his disclaimer, upon an attempt to re-organize society. On one of those not infrequent occasions when General Booth, or his literary representative, slips out of grandiloquence into slang, he remarks that to "save" "three millions of people" is "a large order." To put an end to casual labor and to sweated labor is a very much bigger "order" than General Booth realizes.

But of all the reasons for misgiving perhaps the most weighty is this. General Booth speaks throughout as if no serious attempt had hitherto been made to grapple with the evils he points out, and is absolutely silent about all the many movements around him which are already proceeding on lines similar to those he lays down. For instance, speaking of charity in the ordinary sense of the term, and its inadequacy, he makes the astounding assertion: "There is at present no attempt at Concerted Action."[1] What then of the Charity Organization Society? Let us grant, what probably General Booth would assert, that the platform of the Charity Organization Society is a narrow one. Let us even go further, and allow that in some localities it is so unpopular — partly by its own fault, but still more owing to the stupidity of the public — that it can hardly hope to realize its aim. Still, every one who knows anything at all about the social history of the last quarter of a century knows that it has done and is doing admirable work. General Booth might have pointed out, if he had chosen, its comparative ill success. Perhaps his literary adviser thought it invidious to

[1] Booth, p. 73.

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do so. But that cannot excuse a statement which, as it stands, obviously contradicts facts.

Then, again, would any one who reads the chapters on the "Prison Gate Brigade"[1] and the "Rescue Homes for Women"[2] guess that there were already prisoners' aid societies in connection with every jail, which were carrying out with some measure of success the very plans General Booth suggests; and that there were already hundreds of refuges for women in existence? Read the awful account of one of the resorts of prostitutes in Woolwich, "where one of our Rescue Homes is established"; with its picture of violence so great that policemen hardly venture down the street, but where "our two lasses go unharmed and loved at all hours."[3] Does not the narrative imply that the Salvation Army alone ventures into this hell-upon-earth to bring hope and deliverance to its wretched inhabitants? And yet for years women equally compassionate, equally inspired by the spirit of self-sacrifice, have been doing their best there. General Booth may reply that silence is not denial; that he is pleading for help to his own organization, and cannot turn aside to discuss what others are doing. But again we must remember that his book is substantially an appeal for money. If he gets money in large sums, it will be from people who know little of what others besides General Booth are doing, and who will get their information almost entirely from what they find in this volume. Certainly General Booth cannot be said to err on the side of generosity and delicate consideration for others.

Notwithstanding all these very strong reasons for hesitation, the charitable public has responded liberally to the appeal. Before the end of January in the present year, General Booth had received £100,000, and his scheme had been "publicly inaugurated."[4] It becomes necessary, therefore, to see exactly what the scheme is. General Booth proposes to establish:

(1) The "*City Colony.*" This will consist of "a Receiving House for the Destitute in every great centre of population,"[5] where, for the sum of four pence, every person that

[1] Booth, pp. 137 *seq.* [2] *Ibid.* pp. 188 *seq.* [3] *Ibid.* p. 55.
[4] See the English newspapers of January 30, 1891. [5] Booth, p. 94.

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applies will be provided with food and shelter for the night; and where, in the more frequent case of the entirely penniless, every applicant will be enabled to earn the sum required. This will involve the creation of "Industrial Workshops." Hitherto employment has been found for most of the applicants in the manufacture of benches and other requisites for the Salvation Army; but articles are also produced for the outside market,[1] and it is intended to enlarge this side of the work as part of an effort to destroy sweating.[2] Closely associated with the "Factories" are to be a number of "Rescue Homes for Women," and of homes for discharged prisoners.

2. The "*Farm Colony.*" There are to be a number of settlements in various parts of England, not far from the great cities, and yet not near enough to a town or village to incur any risk from public-houses. To these settlements are to be drafted from the factory and its appendages such persons as seem likely to behave themselves and work satisfactorily. Their labor is to be chiefly in the direction of spade husbandry, market gardening, and fruit-growing. After a time, however, an attempt will be made to establish village industries.

3. The "*Colony over the Sea.*" To this emigrants are to be sent under proper supervision and direction, after they have received a suitable training upon the farms.

These are the essential features of "the Scheme."[3] Everything else is subsidiary; and with the three "colonies" the whole project stands or falls. Indeed, in criticizing it, we may for the present confine our attention to the first part of it, the "City Colony." It is hardly likely that the farm-settlements can be established in the shape General Booth proposes, — and it is certain that reformed settlers cannot be sent in the "gospel-ship" to the colony over the sea, — before the city factories and refuges have had a considerable measure of success.

In examining the project it is advisable, for the sake of clearness of thought, to subtract from it, for a moment, what General Booth regards as an essential element — its association with the Salvation Army. We may then turn back, and ask how far

[1] Booth, p. 108. [2] *Ibid.* p. 110. [3] *Ibid.* pp. 91–93, 272, 273.

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our conclusions need to be modified by the consideration that the Salvation Army is to work the plan.

Suppose some philanthropist, whose labors were not connected with religious efforts like those of the Salvation Army, asked our money to assist him in carrying out such a scheme, — what should we say? We should bring this fatal objection, that experience makes it certain that the refuges and workshops would do more harm than good. It is not as if there were a certain definite number of vagrants and loafers, and these could be taken in and provided for without affecting the rest of the population. On the verge of this class are a much larger number who, in spite of hardships and temptations, are struggling along and trying to make a livelihood for themselves. Everything which tends to make vagrancy and loafing more easy, everything which increases the ways in which men can get food and shelter for the asking, increases the number of vagrants and loafers. A sufficient illustration will be found in Mr. Bosanquet's pamphlet:

> In the winter of 1887–88 there was great public sympathy for the homeless poor in Trafalgar Square. Benevolent persons gave meals in the Square, opened refuges for homeless cases, distributed through the police tickets for lodging-houses. 1887 and 1888 were not specially bad trading years, compared, for example, with 1886. The result of this outburst of feeling was that the registered number of admissions to casual wards rose in 1887 by 30,000, and in 1888 by 130,000 compared with 1886. It may be said that this is very odd, because it was understood that the casual wards were the hardships to be avoided, and the multiplication of the refuges was meant to save the people from the casual wards. That is the sort of thing that the charitable public swallows. But the fact is, in filling the refuges you at the same time fill the casual wards. You tempt men into begging with your refuges and free meals, and when they have become beggars, they go to refuge and to casual wards pretty indifferently [page 36].

But it will be replied that General Booth will impose conditions such as will prevent this increase of vagrants:

> There is no compulsion upon any one to resort to our shelter, but if a penniless man wants food he must, as a rule, do work sufficient to pay for what he has of that and of other accommodation. I say, as a rule,

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because, of course, our officers will be allowed to make exceptions in extreme cases, but the rule will be, first work then eat. And that amount of work will be exacted rigorously. It is that which distinguishes this scheme from mere charitable relief [page 106].

The work-test may possibly be efficacious while the factory is still on a very small scale; but as soon as it is attempted to make a large affair of it, this dilemma will present itself: either the conditions will be relaxed, or the vagrants will not go to it — except in very bad weather. This difficulty is met by the argument[1] that when the public become aware that all men can find work if they will but go to the Salvation Army shelter, they will refuse to give alms, and the beggars will have to go and work. This would be valid enough, if General Booth could at once blot out of existence all other refuges but his own, if he could at once provide work for all the vagrants and unemployed of London or rather of England, and if he could at once persuade all the benevolent that the destitute were being adequately looked after. But he cannot do this. For many years to come he will be establishing his refuges here and there, and people will still go on indulging in miscellaneous charity; and meanwhile the drones will prosper. Indeed, General Booth would seem to have some misgivings himself; for he is reported as saying at his inaugural meeting that "he would send to *prison* those who were able-bodied but would not work." However, the first alternative that I have suggested is the more probable. It is that when large bodies of men come to be gathered together in the "Factories," discipline will insensibly relax; most of them will do just as little as they possibly can, consistently with the pretext of being employed; and the Salvation Army, out of fear for its own reputation, will consent to put up with it.

But is not this, it may be urged, an unnecessarily gloomy and uncharitable view to take of the class General Booth aims at benefiting? Are there not many honest and hard-working men who are reduced to distress simply by want of work? On this point General Booth on the one side, and most of those

[1] Booth, p. 261.

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who have been long engaged in charitable work on the other, hold diametrically opposite opinions. We are here considering, of course, primarily the condition of things in London. General Booth clearly believes that with a very large number of persons inability to obtain employment is the main cause of distress. In one passage he says: "Work, work! it is always work that they ask."[1] And again:

> How do these Out-of-Works conduct themselves when you get them into the Factory? Upon this point I have a very satisfactory report to render. Many, no doubt, are below par, under-fed, and suffering from ill health, or the consequence of their intemperance. Many also are old men, who have been crowded out of the labor market by the younger generation. But *without making too many allowances on these grounds*, I may fairly say that these men have shown themselves not only anxious and willing, but able to work [page 109].

On the other hand Mr. Loch, the Secretary of the Charity Organisation Society, lays down that

> want of employment, in nine cases out of ten in which the plea is used, is not the cause of distress. It is, as often as not, drink [page 71].

While it must be allowed that the number and character of the unemployed are subjects upon which we still need a good deal more definite information than is yet accessible, it must also be allowed that, as the question presents itself in relation to General Booth's project, Mr. Loch's dictum is both true and important. Among decent artisans there are occasionally prolonged periods of slack trade. But men of this class usually manage to struggle along with the help of their friends and of their union funds. They seldom take part in an "out-of-work" demonstration, and would very rarely come to General Booth's shelters. Of the unskilled laborers, also, many are doubtless from time to time in sore distress from want of work. But there is a consensus of opinion among those who have a right to make any statements on the subject, that of the frequently-unemployed among the unskilled labor class, a very large proportion are the victims of drink; while the rest are in most cases below the average in

[1] Booth, p. 31.

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either steadiness of purpose, strength or ability. It is true that with many observers, even with one so sympathetic and cautious as Mr. Charles Booth, there is too great a tendency to regard these facts as ultimate. Addiction to drink, and still more, shiftlessness and incapacity, are very largely the outcome of social conditions. But this does not make the outlook any brighter for General Booth's scheme. Grant that the shiftless and intemperate cannot be held altogether responsible for their ill fortune, — still, unless you put an end to the conditions which tend towards the formation of such a class, you cannot get rid of it; and in trying to get rid of it in the rough and ready way which General Booth proposes, you will but increase it.

This is the fatal defect of the scheme; and it would weaken the argument to say much more. But there is one other consideration to which it may be well to refer.

There are already institutions doing very much the same work — minus the Salvation Army element — as General Booth proposes. The meaning of his scheme is that all these are to be disregarded. The toil of generations of philanthropists is to be thrown away, and we are to start afresh. But we cannot start afresh. The other institutions are there; and what is chiefly needed is to improve them, and to induce them to co-operate with one another, rather than to add to them. Take two examples. In every union there is a casual ward. The casual wards are by no means all they might be: but considering that the country already has the buildings and the officials, that it has a fairer and more reliable system of providing the necessary funds than that of charitable subscription, and that a good deal of experience has been gained, — would it not be wiser to bend our energies towards making the casual wards more useful, than to set up opposition refuges by their side? It must be added that, defective as the casual wards may be, the readers of *In Darkest England* will do well not to accept without verification the particulars concerning them which the book presents. The chapter in question is more than usually inaccurate.

Then again, under the heading, "A new way of escape for lost women," General Booth says:

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We have already made an attempt at grappling with this evil, having about 13 Homes in Great Britain, accommodating 307 girls under the charge of 132 officers. . . . We propose to remodel and greatly increase the number of our Homes both in London and in the provinces [page 158].

But there are already scores of such homes in existence; and there has already begun to be a danger lest the multiplication of them should encourage the very evil they are designed to remedy. Take these quotations from the annual reports of two of the existing institutions:

The House of Mercy at Clewes writes: . . . "The practice is, we regret to say, growing of women going to one Home after another without any real purpose of amendment of life." And again, one of the visitors of the Female Mission to the Fallen remarks: "The multiplicity of Refuges facilitates the practice of evil-disposed women passing from shelter to shelter, disturbing those who are inclined to reform."[1]

Here again it is consolidation that is wanted, not fresh attempts on the old lines.

Let us now return to the element in the scheme which we have temporarily omitted, — its connection with the Salvation Army. It is the refusal to consider this element which gives the arguments of some of the adverse critics such an air of unreality. It often seems as if the two parties to the argument were speaking different languages. For what, in fact, is General Booth's real answer to all such objections as those adduced above? It is that the Salvation Army can safely do what others cannot; because it expects to "save" in the moral sense, to effect a transformation of character in a majority of those who come within its reach. He points to the many cases in which such a transformation has already been brought about.[2] He believes that the same proportionate success will be obtained when the movement has lost its first novelty and is far larger than it is now:

[1] Quoted in Loch, pp. 76, 78.

[2] See, for example, the list of "Shelter trophies," with the final note, in most cases, "got saved." Booth, pp. 100 *seq.*

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There's no reason to think that influences which have been blessed of God to the salvation of these poor fellows will not be *equally efficacious* if applied on a wider scale and over *a vaster area* [page 104].

He has no fear lest the wave of moral victory should ever ebb:

Our plan contemplates nothing short of revolutionizing the character of those whose faults are the reason of their destitution. . . . To stop short with them of anything less than a real change of heart will be to invite and ensure failure. But this we are confident of effecting — *anyway in the great majority of cases* [page 252].

And with this hope, his picture of the farm colony and the colony across the sea become very Utopias:

We shall rely greatly for the peace and prosperity of the Farm Colony upon *the sense of brotherhood which will be universal in it* from the highest to the lowest [page 124].

This belief is not altogether devoid of a certain *a priori* reasonableness. It might be argued that the somewhat similar attempts which have more or less failed in the past have either had no connection with religious agencies, or else such religious efforts as have accompanied them have been "from above to below," the endeavors of a higher class stooping down to those whose thoughts and trials they imperfectly understood; and that they have never had such a force at their back as the consuming fervor of the Salvationists, social reformers who have themselves lived in the circumstances of those they seek to raise. We are told to notice the wonderful transformations of character that have already taken place under the ministry of the Salvation Army; and the number of officers, soldiers and "barracks" is held up before us as a guarantee of the strength and permanence of the organization.

This QUARTERLY is not the place for theological discussions; but it cannot be unfitting to examine this promise of the Salvation Army from the point of view of the student of popular movements. We can do this without committing ourselves to any opinion as to the doctrines taught or the methods resorted to by the Army. Does experience justify the claim that the moral success of the Army is likely to be sufficiently great to

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form a safe foundation for the economic task which it has taken in hand? I am afraid the answer must be in the negative. To judge from the evidence of those who have had an opportunity of watching the operations of the Army closely, its history in most localities is something like this. Its arrival creates a great ferment; during the first few months it gains a band of adherents, and there are some wonderful instances, which cannot be gainsaid, of moral reform. But then the progress of the Army in that particular place comes to an end. Its services are still held; but adherents are now added one by one at long intervals, and the "Corps" is as little likely to effect the regeneration of the "residuum" in that district as any of the surrounding religious bodies. Hence the growth of the Army in numbers has not been a steady and sustained growth in their earlier fields of labor: it is the result of the constant establishment of fresh corps in new places. This is a feature not peculiar to the Salvation Army; it has characterized many similar religious movements. But the significance is apparent when we return to the Salvation Army shelters and workshops. They are a comparatively new departure in Salvation Army work; those who engage in it have now all the enthusiasm of a new enterprise, and the ablest and most fervent officers are drafted into it. With this pressure of ardent sympathy and brotherly love around the poor wretches who enter the shelters, we can in part understand the wonderful changes of character that have been witnessed. But the analogy of other Salvation Army efforts, and of similar movements elsewhere and at other times, makes it humanly certain that this regenerating current will not long continue to flow, especially when it is spread over a wider field. And if it does not, all the objections which would be justly urged against the scheme in the hands of any but General Booth will be abundantly justified. For with such a machinery you must either change the vagrant's character, or you will still further pauperize him, and with him many who have as yet escaped the taint. And, in the long run, the latter result is more probable than the former.

W. J. Ashley.

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REVIEWS.

Histoire de la Participation de la France à l'Établissement des États-Unis d'Amérique. Correspondance Diplomatique et Documents. Par HENRI DONIOL. Tome Quatrième. Paris, Imprimerie Nationale, Alphonse Picard, Éditeur, 1890. — Large 4to, 721 pp.

For the great work, of which this is the fourth instalment, American scholars are indebted both to the industry of M. Doniol and to the liberality of the French government. It is at once a diplomatic history and a collection of documents, the one part illustrating and confirming the other. Its interest to the student of French history is quite as great as to the student of American affairs. No existing work throws so much light upon French diplomacy during the first decade of the reign of Louis XVI as does this. The *Archives Nationales* have furnished nearly all the material from which it has been written. That material has been used throughout in the most conscientious and scientific manner. The result is a thoroughly original work, a standard authority for all time to come.

In the earlier volumes the purpose of the author has been to show from the French diplomatic correspondence how the plan of aiding the American colonies in their revolt against England was conceived, and to trace every step in the development of it. It was the result of a deliberate and sustained effort on the part of France to recover the position which she had lost during the Seven Years' War. Count Vergennes, the foreign minister of Louis XVI, formulated the plan and led in its execution. His guiding influence appears at every point from the beginning to the end. Here for the first time we have a truthful picture of this statesman, drawn in the main by his own hand. Like the Frenchmen of his generation, he believed that England was the chief disturber of European peace. To him she seemed overbearing, bent on conquest, a restless, faithless power. Chatham was the incarnation of her worst qualities. France by resisting her encroachments would promote the interests of every European nation. In order to achieve success in this enterprise Vergennes followed with perfect consistency and honesty a threefold course of action.

(1) He availed himself as far as possible of the help of Spain. Upon this he had a claim by virtue not only of the interests of that country, but also under the terms of the Family Compact. Previous to

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the overthrow of Pombal the aggressions of Portugal in South America forced Spain to act in harmony with France and in opposition to England. After they ceased and Florida Blanca became chief minister at Madrid, it was a task of the greatest difficulty to keep Spain true to the French alliance. The interests of the two countries were not the same. Spain was weak and hesitating. She desired to mediate between France and England. It was not till April, 1779, that she could be induced to sign a convention promising military and naval assistance to France. The aid which she then gave was so slight that it had no determining effect on the struggle. The record of the wearisome negotiations between the two Bourbon courts appears at length in these volumes.

(2) To the mind of Count Vergennes the American colonies were a part of the European political system. Their revolt was therefore an event of the greatest importance. If England subdued them, her power would be thereby increased and she would be ready for further aggressions. If they became independent, she would, in his opinion, try to make good her loss by conquests among the Spanish colonies and the remaining foreign possessions of France. In either case war between the Bourbon powers and England was from the first regarded as almost inevitable. Therefore France began to prepare for it by strengthening her navy, by drawing closer the bonds of alliance with Spain, by encouraging the Americans in all possible ways. In these volumes we have the reports of her ambassadors at London and of the emissaries she secretly employed both in England and the United States. The correspondence of Beaumarchais, so far as it has not already been published, is given. The story of the reception of Silas Deane and of Franklin at Paris is again told. Much new material is given concerning the early movements of La Fayette. It appears that from the first to the last, before as well as after the conclusion of the treaty of alliance, Vergennes acted toward the United States in perfect good faith. He believed that its independence, either with or without a truce, must be secured; to this he was ready on all occasions to pledge the honor of France. He sought only such advantages from the future political and commercial growth of this country as might legitimately flow from such a consummation. He did nothing that was inconsistent with the main object of his policy. The proof of this appears in his correspondence with the Spanish court, and with Gerard and Luzerne, the plenipotentiaries whom France first sent to America. It may therefore be imagined that the Lees, Samuel Adams and John Adams, the leaders of the "anti-Gallican faction" in this country, appear in these volumes in an unfavorable light. They distrusted France and intrigued against her. They were ready, when occasion offered, to conclude a separate peace with England. This was closely

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connected with their opposition to Washington and Franklin, who from the first welcomed French assistance and were ready to co-operate.

(3) The harsh maritime code of England furnished as many causes of complaint as did her operations on land. As soon as war commenced neutral vessels began to suffer from her depredations. Vergennes took advantage of this to isolate her and prevent the extension of the war to the continent. The danger of a conflict over the Bavarian succession had been averted by the mediation of France. Advances were now made to the Dutch Republic, to Denmark, Sweden and Russia, which led to the armed neutrality of the Northern Powers. In view of all this the claim of the author that the efforts of the French minister to restore the prestige of his nation were well directed and successful will not be denied.

The volume which is the immediate subject of this review covers the events from the summer of 1779 to the surrender at Yorktown. It treats more directly of American affairs than does any of its predecessors. The chief sources of information that have been used are the correspondence of La Fayette, Rochambeau, D'Estaing and the two French ministers. The letters of Gerard have been found most valuable. During his period of service Gerard was on intimate terms with many of the prominent members of Congress, presented arguments before committees, and in short led the majority in its repeated struggles with the "anti-Gallican faction." He protested against the extreme demands of New England in reference to the fisheries. He sought to harmonize the desires of the South concerning the navigation of the Mississippi with the claims of Spain. He saw clearly how inexperienced were the members of Congress, how crude their methods of business, to how great an extent jealousies and intrigues prevailed among them. He witnessed the indifference which after 1777 took possession of the people, and the suffering caused by the depreciated currency. The view which he took of the situation was substantially the same as that of Washington. It was that the United States were unable alone to achieve their independence. Hence Gerard as the representative of the French government insisted that the questions at issue should be settled in a way consistent with the public law of Europe. This idea he urged in opposition to the egoism and radicalism of the Adamses and their supporters. Both he and his successor had occasion to defend Washington and Franklin against the charges made by their opponents.

M. Doniol has devoted special attention to the campaign of 1781 in Virginia, to the defence of that state by the small force under the command of La Fayette, and to the siege of Yorktown. He shows that the operations of that year were mainly planned and executed by the French. La Fayette's brilliant manœuvres attracted much attention.

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The French commanders, especially Rochambeau, urged that the expulsion of the English from the South was of more importance than anything which could be accomplished in the neighborhood of New York. Washington could not be brought to accept this view, but he consented that a summons should be sent to De Grasse to sail northward with a squadron and troops from the West Indies. De Grasse started as soon as possible for the Chesapeake. Cornwallis under orders from Clinton had retired to the peninsula of Yorktown and was there watched by La Fayette. The situation was so favorable that Washington yielded to the persuasions of Rochambeau, and the united French and American forces started southward for the Virginia coast. The surrender of Cornwallis soon followed and thereby the position of the English at New York was rendered untenable. Of the forces that co-operated at Yorktown less than 4000 were Americans. The French had 7000 land troops and all the vessels and marines.

The appearance of the fifth and concluding volume of this work will be awaited with interest. It will contain the history of the peace negotiations.

HERBERT L. OSGOOD.

The Life and Times of John Dickinson, 1732–1808. Prepared at the request of the Historical Society of Pennsylvania, by CHARLES J. STILLÉ, LL.D. Philadelphia, The Historical Society of Pennsylvania, 1891.— 8vo, 437 pp.

The subject of this biography has been aptly styled "the penman of the Revolution." The resolutions of the Stamp Act Congress, the well-known letters of a Pennsylvania farmer, the resolutions of the first Pennsylvania Convention, the first and second petitions of the Continental Congress to the King and their address to the inhabitants of Quebec, the declaration of the causes for taking up arms, and the first draft of the Articles of Confederation are all the product of his mind, and made him one of the leaders in the earlier stages of the struggle. Dr. Stillé and other writers before him have agreed in assigning the waning of this popularity to his opposition to the Declaration of Independence. But John Jay, William Livingston, Edward Rutledge, R. R. Livingston, Benjamin Harrison and Robert Morris were equally agreed as to the inexpediency of that declaration, and they seem to have in nowise suffered for their opposition. As a matter of fact, Dickinson's attitude did not deprive him of the confidence of the Continental Congress; for that body, at the very time when his opposition to independence was most pronounced, appointed him to draft the plan of government. It was only in his own colony that he suffered loss of prestige, and this was

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due not so much to his attitude on the question of independence as to the clever partisan use that was made of this question. Dickinson was the head and front of the party which desired to preserve the proprietary charter, which for twenty years had been the paramount subject of controversy in the politics of the colony. A large party was opposed to this; and when independence became the question of the day they turned it to the purpose of crushing Dickinson and his party. They gave currency to the opinion that Pennsylvania could never take a firm stand with her sister colonies till the charter was destroyed; and so obtained a resolve from the then powerful and popular Continental Congress which enabled them to subvert the old government. Nor could Dickinson justly object that the convention which usurped the place of the assembly so destroyed was illegal and revolutionary, for he had taken part in the first of these self-created gatherings and had only drawn back when he found they had passed from his control to that of Franklin and the party he represented. The description of the struggle between these two factions, from 1755 to 1776, is one of the most valuable portions of this volume, and we agree with Dr. Stillé that the so-called proprietary party were right in their views of the interest of the colony; but in a time of revolution the "freeholders of £60" have little chance in opposing "the freeholders who have paid taxes and the sons of such freeholders"; and here, as in Virginia, the movement in favor of democracy played a most essential part in the revolutionary struggle.

Another point of much interest is the distinction the author draws in the attitude of the different statesmen of the period towards the Revolution. Many of the lawyers of the middle and southern colonies who had studied at the courts of law in London derived from this training, he claims, the theory of "legal resistance"; while the view of "natural right" common in New England he believes due to the lack of this training. Certainly the arguments of the period support this opinion; for the ground taken by Bland, Dulaney and Dickinson is radically different from that occupied by Otis, Hopkins and Jefferson. The distinction drawn by the former between internal and external taxes was, in the light of to-day, a very fine-spun and typically lawyer-like argument; but it gave the colonies a common ground between 1766 and 1775 and so rendered valuable service.

Certain errors need to be noted. Among them are the statement that Pennsylvania was the first state to ratify the federal constitution; the impression conveyed (page 191) that Dickinson drafted the "Plan of Treaty," which was in fact the work of Adams; and the ascription to Franklin of the "Reply to North" (pages 103–4) which was written by Jefferson. Nor is it just to the Continental Congress to give only Dickinson's own version of his behavior during the mutiny of the con-

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tinental soldiers, — which the reviewer deems the greatest blot upon his record, — when Dickinson's message was declared by the chairman of the committee of Congress to be an unfair and partisan statement. Finally, the index is, for such a book, singularly inadequate and imperfect.

We possess many lives of the leaders of the American revolution, especially of those from New England and Virginia. But there were many men equally prominent in their day whose fame suffered temporary eclipse by reason of unpopular acts or a change in public opinion, and whose services have to the present day been too little appreciated. To this class Dickinson belongs; and for this sketch of his career Dr. Stillé and the Pennsylvania Historical Society deserve the thanks of all students of American history.

PAUL LEICESTER FORD.

Lewis Cass. By ANDREW C. MCLAUGHLIN. [American Statesmen Series.] Boston and New York, Houghton, Mifflin & Co., 1891. — 12mo, vii, 363 pp.

The public life of Lewis Cass was one of the longest in our political history. His acts affected every administration from Jefferson's to Lincoln's, both inclusive. He remembered the adoption of the constitution, and he lived to see and rejoice over its preservation by the successful conclusion of the Civil War. He was one of the earliest legislators of note in Ohio; he was a distinguished soldier and officer in the war of 1812; he was governor of the territory of Michigan when Michigan, except in a very few localities, was little more than a wilderness, and at the same time he was an explorer and peacemaker of no ordinary qualities; he was secretary of War during a critical period; he was minister to France when France was at her gayest before the Second Empire, and he attracted as much attention there as any diplomatist of that decade; for twelve years he was a member of the ablest Senate in our history, and he was one of its leaders when great debates were common occurrences; he was candidate for the Presidency once and a conspicuous candidate for nomination several times; he held the highest place in the cabinet when it was a nest for treason, but he had the courage to leave it and to denounce treason, and subsequently to support the war against secession. There are probably very few, however, who would claim that Cass was a great statesman; he would not be classed with the twelve greatest of this century; but nevertheless he was a great public character, having a striking individuality and great political influence, and it is therefore fitting that his life is told in this series.

The chief purpose of biography is to give a clear and positive impres-

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sion of the personality of the subject treated. History demands a proper perspective; in biography the perspective is of secondary importance. Therefore any person of strong individuality is a proper subject of biography; and he who is devoid of individuality, however important a place he may have filled, may best be left without a biography. Sumner, Stephens, Yancey, Douglas and Giddings are good examples of the former class, and such Presidents as Pierce, of the latter. To describe a forceful personality requires keenness of perception, breadth of view, and fearlessness of criticism. It is because the authors of *John Quincy Adams*, *Henry Clay* and *John C. Calhoun*, published in this series, possess these requirements that these books will always take high rank. A professor of history should not lack these qualities. But the first paragraph of the preface of this book contains the startling confession: "I have neither cared nor dared to place an estimate upon his [Cass's] character different from that held by the men who knew him and trusted him." One of the faults of the book (though not the only one) is that the author has been true to his preface.

The first chapter, on "The Old Northwest," contains some good writing, and was not composed without research; but it is not compact, and describes extraordinary occurrences and conditions as if they were a part of the every-day life of the time. This chapter might well have been used as a background for Cass's career as territorial governor; for to this latter theme forty pages are devoted in chapter iv. But these chapters are neither symmetrical in themselves nor do they develop from or into one another. W. L. G. Smith in his *Life and Times of Lewis Cass* has treated this period very fully and has furnished much valuable material. The present author, for some curious reason, has confined himself largely to general statements regarding Cass's specific aims and acts in attempting to organize and civilize "the old Northwest." In 1817 he made a treaty with the Indians by which they ceded to the United States 4,000,000 acres of land in Ohio, Indiana and Michigan. Calhoun, as Secretary of War, spoke of it "in its physical, political and moral effects, as the most important of any [treaties] that we have hitherto made with the Indians." Our biographer does not descend from generalities even to mention it specifically. The thirty-four pages devoted to the "Secretary of War" tells us so very little about Cass's policy and official acts that one is reminded of the trite saying about the play of Hamlet with the prince left out. Here again the writer might have learned interesting particulars from Cass's early biographers, had he not been so fearful, as he tells us in his preface, of "coming into close contact with their indiscriminate justification."

The author's lack of insight into Cass's character, and his inability to defend Cass as he understands him, are shown in several places.

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Speaking of Cass's vigorous protest in 1842 against the ratification of the quintuple treaty for the suppression of the slave trade, he roundly (and absurdly) berates von Holst for calling Cass a "log-roller" (pages 181, 182). He then proceeds to give his own interpretation, which plainly shows that in the matter under discussion Cass went far out of his way to champion the Southern view of slavery. This of course enforces von Holst's point. Yet the author calmly tells us in the same paragraph: "The prime motive for the action of Cass in this affair was his inveterate dislike and distrust of England, sentiments which he had good cause to entertain." Then again, — and the fact is further evidence of the exactness of von Holst's judgment, — after Cass had most abjectly prostrated himself before the Southern demands for the annexation of Texas, the author pleads in a weak way against the charge that Cass was a "doughface" and "a Northern man with Southern principles" (pages 210, 211). He laments that the judgment of later years demands that the life of every one who has claims to be considered a statesman should be lighted by a moral flame (as were those of Sumner and Seward); for this "gives no room even for the play of conservatism, for doubt, for mental inertia, for the feeling so common at the beginning of every great moral movement, that the agitator is a senseless fanatic" (page 211). Yet only a few pages further on we are favored with this wholesome truism: "A statesman should be a leader and should create sound public sentiment" (page 219).

Cass was secretary of State for four years, lacking three months. This is the most satisfactory period of his life. The printed records of these years cover thousands of pages, and the original archives are accessible to scholars. The diplomatic history of this time is both important and intensely interesting. But our author gives merely an ill-digested statement of the settlement of the question of visitation and search, and mentions, each in a brief paragraph, the Italian and Mexican questions. One wonders if he has never heard of the foreign policy of Buchanan's administration in relation to slavery, and how it worked itself out in respect to the slave trade; of the attempted acquisition of Cuba, and the filibustering expeditions in Central America; of enforced enlistments of naturalized Americans in Prussia; of our relations with Paraguay and China — or, in fact, of our foreign relations in general at this time. Certainly these are relevant questions, and of more biographical importance than Indian fights in "the old Northwest," and the Eaton scandal and many other digressions found in previous chapters.

There is not a chapter in the whole book which does not in some part indicate haste or carelessness, or both. As evidence of worthless and ludicrous citings of authorities, let these suffice: "From a Speech by Mr. Miller, in Senate, 1833" (page 158); "Private papers of Lewis

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Cass" (page 162); "Congressional Globe" (page 223); "New York Sun" (page 247); "Newspaper article" (page 280); "Personal information obtained from manager of telegraph line" (page 346). The author is to be congratulated upon the evidences of first-class literary ability which this book contains, and that its defects do not forbid future and more careful efforts.

FREDERIC BANCROFT.

Canada and the Canadian Question. By GOLDWIN SMITH, D. C. L. London and New York, Macmillan, 1891.— 325 pp.

Professor Goldwin Smith's general views as to the future of the Dominion of Canada are well known. By the operation of political gravity Canada must, it appears to him, fall into the United States. Geography; commerce; identity of race, language and institutions; the mingling of population and constant intercourse of every kind, — these are, he thinks, the primal forces which are acting in ever-increasing intensity, and which have already brought about a general fusion between the two countries, leaving no barriers standing but the political and fiscal lines. One of these political lines he calls a "phantom monarchy"; and he declares that if these primary forces are working toward an event, "sooner or later the crisis arrives, the man appears, the bidding of destiny is done."

With these general views Professor Smith has written an admirable book, not to prove them nor even to state them, but a book which will nevertheless leave them imprinted upon any one who reads it with an open mind. The scope and function of the work is best stated by the author himself:

> For this purpose, which is neither elaborate description nor detailed history but the presentation of a case and of a problem, it seemed best, first, to delineate the Provinces which are the factors of the case; then to sketch their political history leading up to the Confederation; then to give an account of the Confederation itself, with its political sequel, up to the present time; and finally to propound the problem.

All this Professor Smith has done; and he has moreover done it in such a way as to make his work not only valuable to the students of political science but interesting to the general reader, — although he himself says, of a part of his subject (the British North America Act), that to impart anything like liveliness to it one must have the touch of Voltaire. It is a distinctive quality of the book that it is interesting. Until within a few years most Americans — could anything better illustrate the position of the Dominion than the fact that Canadians are never called Americans? — knew rather less about Canada than about the Sandwich Islands; and this book will give to those who desire it a full and clear

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notion of what Canada is and means, while to many Canadians it must reveal their manifest destiny.

Canada, though a colony, is not a dependency of Great Britain. Professor Smith puts the difference between the two distinctly. If he were writing controversially, he would doubtless emphasize even more than he does the fact that the views and arguments both of the Imperial Federationists at home and of the rampant (and, as he caustically suggests, snobbish) Loyalists of Canada are largely based on the assumption that the two are always the same.

It is easy to see that Professor Smith has run a tilt in his time with Sir John Macdonald, the late Premier of Canada. But he can afford to be generous; for he must be convinced that his views of the future of Canada, rather than those of that adroit politician, are true and must in the end prevail.

One of the most distinguished Englishmen who ever came to this country, speaking of his journey through Canada, said of its people and government that they were neither fish, flesh, fowl nor good red-herring; and the writer once heard Sir John Macdonald himself describe how Lord Salisbury had asked him why he came to leave Scotland for Canada, and how he had replied: "Is it not better, my Lord, to be the founder of a new nation than the prime minister of an old one?" The contempt of Canada underlying the first remark and the bumptiousness and inaccuracy of the second equally vanish before a book so full, so sober, so just — and if we believe in the sure working of the primal forces he describes we must add — so wise, as that which Professor Smith has written.

F. W. W.

Zur eigenen Lebensgeschichte. Von LEOPOLD VON RANKE. Herausgegeben von ALFRED DOVE. Leipzig, Duncker und Humblot, 1890. — 731 pp.

This volume closes the edition of the collected writings of Leopold von Ranke. It was the intention of the great historian to devote a special work to the events of his own life, viewed in connection with the general course of scientific and historical development during the nineteenth century. When startled in 1863 by the death of Jacob Grimm and other friends, he put in written form a sketch of his childhood and of his student life. This was followed in later years by dictations outlining his experiences as a teacher in the gymnasium at Frankfort on the Oder and parts of his subsequent career at Berlin. These are printed at the beginning of the present volume. The composition of the *Weltgeschichte*, however, prevented further autobiographical studies, and for additional knowledge of his life the reader must rely mainly on the correspondence.

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This consists of letters written to the various members of his family, to scientific friends and to his publishers. The letters which reveal the deepest workings of his mind during early and middle life are those to his favorite brother Heinrich. Those to Heinrich Ritter, the historian of philosophy, are the chief sources of information concerning his early researches in the archives of Vienna and the Italian cities. As years and disciples increase his correspondence with Waitz, Giesebrecht and von Sybel becomes more important. His letters to his wife, who was of English birth, contain his impression of life and work at Paris, London, Brussels and the Hague. The volume closes with a variety of extracts from his diary, and a number of occasional pieces. Among these his conversations with Thiers at Vienna in the autumn of 1870, and the proposition which he laid before Prince Bismarck in 1871 for the establishment of a National Academy for German History and Language are the most important.

The student turns with the greatest interest to the materials collected in this book for information concerning the early training and the inner life of this master of modern historical research. The impression which they leave is essentially the same as that which one obtains from the study of his works. Ranke was first of all a student of the Greek and Roman classics. He became very familiar with the ancient poets before he even took up the study of the historians or the philosophers. He also read the Old Testament in the original. He in short received that type of education which a century ago produced Niebuhr, Winckelmann, the brothers Grimm and the other great leaders in the revival of classical studies in Germany. Like his maturer contemporaries he was able to *live* in the ancient world even during the years 1813 and 1814. But he did not, he could not, stay there. Soon after he left the university he became interested in historical studies. He fell under the influence of the then prevalent reaction against the Napoleonic despotism and against universal empire in all its forms. He received much inspiration from Niebuhr's *Roman History*. After his removal to Berlin he became fully identified with that group of students among whom appeared the first movings of the spirit of revived German nationality. Their investigations, in whatever direction pursued, had political significance and helped to arouse Germany from its quietism.

Ranke now devoted himself to original research in modern history. His previous training had furnished him the tools with which to work. It, together with the studies upon which he was entering, gave him the broadest possible outlook. His taste had been cultivated by acquaintance with the best models. We therefore find in him from the first a deep insight into the play of human motives and a preference for the study of the larger and more intricate problems of universal history. This led

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him at once into the domain of international relations. He had also the loftiest conception of the duty of the historian to discover the truth and to state it with absolute impartiality. Again and again in his letters and elsewhere does he rebuke partisanship and insist upon thoroughness in research and objectivity in statement. This is the priceless lesson which his life and work have taught the scientific world. He approached his task in a reverent spirit; and so strong with him was the ethical motive, that his study of history became almost a continuous act of worship.

A man of his temper could not be content with second-hand knowledge. He was desirous above all else of knowing and stating things as they were. Hence he early sought the archives and the great accumulations of unpublished materials in the libraries of Europe. In this work he was a pioneer and his reward was great, beyond what any successor can hope to reap. His spirit and the method of his composition were also to a large extent new. They attracted to his books from the first the public attention they deserved. He was fortunate, moreover, in possessing the favor of a government which has always been able to appreciate and reward research, when carried on even for purely scientific ends. When Ranke was on his first leave of absence, in 1828, the Prussian ministry asked him to name the sum of money he desired, and told him to stay away as long as the necessities of his work demanded. It is evident that the liberality of the Prussian government towards its scholars has been wise even from the political standpoint, for no class of its subjects has done more to raise that country to the commanding position she now holds. So long as their strength continues, the spirit of the stock exchange can never dominate her political life.

No purer or more exalted spirit than that of Leopold von Ranke ever adorned the scholarship of any nation. We admire his vast learning, his great productiveness and uniform excellence as a writer. We acknowledge that his work has given tone and character to historical writing among all the western nations, and has had not a little political influence in his own country. But even more than all this we admire the simplicity, the honest, free and catholic spirit of the man. This was his fundamental excellence, out of which all that is highest in his achievements flowed. May his succession continue unbroken in his own country, and may men of his character be multiplied elsewhere, especially on this side of the Atlantic, where the need of such is imperative. American scholars, especially of the younger generation, owe a debt of gratitude to him which cannot be easily repaid.

HERBERT L. OSGOOD.

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P. J. Proudhon: Seine Lehre und sein Leben. Von Dr. KARL DIEHL. Zwei Abtheilungen. Jena, Gustav Fischer, 1888, 1890.— 128, 328 pp.

Studien über Proudhon: Ein Beitrag zum Verständniss der sozialen Reform. Von Dr. ARTHUR MÜLBERGER. Stuttgart, G. L. Göschen, 1891.— 171 pp.

Proudhon is a type of revolutionary France, striving for unbounded liberty only to fall back into despotism. In his youth he breaks the fetters of tradition and hurls forth his famous anathema: "La propriété, c'est le vol." Later in life he is daunted by the spirit he had conjured up. He has grown conscious of the limitations of human nature. He bows before the tyrant against whom he had revolted, and confesses: "La propriété, c'est la liberté." Proudhon's sphere was not the study, but the battle-field; his thoughts are not philosophical theories, but weapons. He was stirred to the depths of his nature by the events of his time; he played a leading part in all its intellectual conflicts. He was, as Michelet called him, a "remueur d'idées." With all this, he was pre-eminently a journalist. His innumerable writings are children of the day. The writer forgets and contradicts his utterances of yesterday. It is not easy to measure such a man by the standard of scientific criticism; to force into the cage of a system his winged ideas which hail every new day with a new melody and most unscientifically sing of an eternal spring. Proudhon can be understood and appreciated only as the child of his country and his time. To paint the picture of the man we must take the colors from the history of France, and the background from the exciting drama of his time. His place is not in the history of socialism and communism, for he was neither a socialist nor a communist. He may with more justice be regarded as the father of anarchism, although the advocates of dynamite disown him.

From the above point of view Dr. Diehl's book must be considered a failure. As such it is, however, very instructive; for it shows exactly how such a work ought not to be done. The author's endeavor is not so much to trace and account for the intellectual character of Proudhon as to criticise some of his productions from the standpoint of the German text-book. At the same time Diehl instinctively feels that the chief importance of Proudhon lies in and ends with the influence he exercised on his contemporaries. In dividing his activity into three periods— (1) the period of preparation, from 1840 to the outbreak of the February Revolution; (2) the period of practical proposals and attempts, from the February Revolution to March, 1849; (3) the period of theoretical studies, to his death in 1865 — Diehl devotes the bulk of the second part of his book to the period of practical proposals and attempts,

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although, according to his division, this period lasted only one year. It was the time when Proudhon tried to bring about a world-wide revolution by means of his labor exchange bank. The idea of abolishing money as a circulating medium by one such institution without state help hardly deserves serious consideration to-day. In the first part Diehl criticises Proudhon's theories of property and value. A third part of the book, yet to be published, will contain Proudhon's life; the excellence of which, we hope, will make the first two parts superfluous.

Dr. Mülberger is evidently an ardent admirer of Proudhon. His "studies," however, which are partly reviews and translations, do not contribute much to the history of the French writer. The most important contribution is an article in which he collects the contradictory views which Proudhon expressed on universal suffrage.

Turning from Diehl's Proudhon to Mülberger's Proudhon we meet an entirely different character. So various and inexhaustible is the material contained in Proudhon's writings, that both writers together, regarding him from different sides, have not been able to draw a complete picture of his personality. But it is not easy to recognize the true shape of an object which is continually moving.

L. KATZENSTEIN.

A Short History of Political Economy in England, from Adam Smith to Arnold Toynbee. By L. L. PRICE, M.A., Fellow of Oriel College, Oxford. London, Methuen & Co., 1891. — 12mo, xi, 201 pp.

Mr. Price disarms criticism at the outset by stating in his preface that his work does not put forward any pretensions to originality. He attempts to sum up as far as possible the general conclusion of the scientific world on the particular writers discussed. In this he is in the main successful. His book is the more interesting because more than half of it is devoted to recent economists who have not yet been at all adequately treated by the historians of economics.

The chapter on Adam Smith is perhaps the least successful. Mr. Price seems to lay great stress on what are after all the less essential features of Smith's theories. He discusses fully the doctrines of the division of labor, money, free trade, *etc.*, but tells us scarcely anything about the fundamental doctrines of distribution. And yet a description of the *Wealth of Nations* that omits the peculiar theories of rent, wages and profits loses most of its value. It is the social side of economics that is really the important side, and the study of great economists should bring out first of all the social scheme of each writer. The same objection holds good in some degree of all the other chapters. Even in

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the case of Malthus, when the field seems so tempting, very little attempt is made to sum up the social consequences of his doctrine, although Bonar and Bagehot are quoted repeatedly. Again, the discussion of Ricardo centres around the doctrine of rent; and although his general social philosophy is hinted at on page 77, yet it is far from being adequately treated.

More interesting, because really newer, are the chapters on Cairnes, Cliffe Leslie, Bagehot, Jevons, Fawcett and Toynbee. They sum up, from a moderate point of view, the chief contributions made by these writers to economic science. Mr. Price, with courtesy and good temper, has an even word of praise for each. His comments are in the main judicious, and are less extreme than the more exaggerated, though more independent, conclusions of Professor Ingram. To the beginner and the general reader Mr. Price's little volume will be both useful and interesting.

E. R. A. S.

The Gild Merchant. A Contribution to British Municipal History. By CHARLES GROSS, Ph.D. Oxford: at the Clarendon Press, 1890. — Vol. I, 332 pp: Vol. II (Proofs and Illustrations), 447 pp.

Dr. Gross's treatise on the *Gild Merchant* is an exhilarating example of the growing internationalism in historico-economic studies. A graduate of one of the younger American universities, Mr. Gross went to Germany and took for the subject of his doctoral dissertation an obscure point in the earlier municipal history of England. He then devoted several years to the patient examination of English archives; the Oxford University Press undertook the publication of the results of his labors; and Dr. Gross has returned to America, to teach history at Harvard. But apart from this, Dr. Gross's book is significant in another way. It deals almost exclusively with the *institutional* as opposed to the economic or social side of its subject; and although such a treatment is apt to be chilling to the general reader, it is certainly the right thing just now. For what has economic or social history usually meant hitherto? It has meant either statistics about wages and prices, or picturesque details about the cut of our ancestors' clothes and the like. Such facts are very useful when we have an institutional framework to fit them into. But we want to know first what exactly were the relative numbers, the legal position, the usual duties, rights and burdens, of the various classes of the population. When we know this, we can then find a meaning for such and such a price, or such and such a local custom. Institutional history is the bony framework of economic history.

Our debt to Dr. Gross is hard to realize, because his main results

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had found their way into economic writing even before the publication of his recent treatise. His conclusions as here formulated do not differ substantially from those in his German dissertation of 1883, in spite of the abundance of hitherto unprinted material which he now appends to them. Moreover, during the three or four years that the present treatise has been in the press, Dr. Gross, with self-sacrificing courtesy, has allowed copies of the proof to pass into the hands of brother-scholars, whose writings have benefited accordingly. Some of us had begun to take his main results for granted and almost to forget that Dr. Gross had never yet received the public recognition which his labors deserved. For he has done great things. He has been the first to show that the gild merchant is a characteristic feature in the early history of almost all English towns. Almost without knowing it, and with the greatest anxiety not to speak in general terms, he has forced upon us the recognition of a stage in English economic development which had before been almost entirely disregarded. That is Dr. Gross's substantial achievement; and much as it may be necessary to supplement, or even in minor matters to correct his conclusions, his name will henceforth be as indissolubly associated with the gild merchant, as that of Mr. Rogers with mediæval prices and that of Mr. Seebohm with mediæval land-tenure. Nor is this all: he has definitely established the distinction between gild and borough, and has shown more exactly than ever before wherein the influence of the gild upon the municipal constitution really consisted. And on a score of other matters connected with his subject, he has either cast entirely new light or added greatly to the knowledge we already possessed. To mention only those which happen especially to interest the present reviewer: the "companies of merchants" of the sixteenth and seventeenth centuries, the "common town bargains," the organization of the home staples, and above all the "affiliation" of mediæval boroughs, — are all subjects whereon Dr. Gross has rendered possible a distinct advance in our reconstruction of mediæval history.

I have however indicated above, that I hardly think even Dr. Gross has said the final word on all parts of his theme. The particular part of it which is still, to my mind, obscure, is the relation of the gild merchant to the craft gilds. That Professor Brentano has led people to think there was a "general struggle" throughout England between the gild merchant and the craft gilds is, in the eyes of Dr. Gross, one of the gravest faults of that arch-sinner. I may, perhaps, in passing, venture to put in a word of humble remonstrance against the somewhat excessive insistence on Brentano's real or imaginary faults. Granted that Brentano's essay of 1868 has abundant defects and that it has led astray most subsequent English writers, it must still be remembered that

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its author was but twenty-three when he wrote it. What we have more right to be indignant about is that the study of social history should have been so dead in England that for years no one thought of going to the sources for himself. And as to craft gilds, it is not so clear after all that Brentano is entirely wrong. Suppose we strip his account of its slightly melodramatic phraseology. Suppose we recognize that the craft gilds which were organized in the fourteenth century had scarcely any "autonomy," and that when and where they did get a share in municipal government, their victory was hardly "democratic," since the gilds themselves had by that time become exclusive. Granting all this, — is there not antecedent probability, and some apparent evidence, that when the earlier craft gilds made their appearance, in the twelfth and thirteenth centuries, there was a good deal of friction between them and the groups of citizens who governed the towns and monopolized their trade? It is true that the evidence refers only to the weavers, fullers and dyers; and it has been ingeniously suggested that the disabilities under which these craftsmen undoubtedly suffered in certain English towns may be explained by the supposition that they were "intruding aliens." But there is scanty ground for such an hypothesis. The more natural explanation is that collisions occurred in these particular cases because it was in the manufacture of cloth that a considerable body of artisans first came into existence. We may allow that English craftsmen were not "as a class," at any rate at first, excluded from the merchant gild or from burghal franchises (I, 109, 214); that is, that they would not be excluded *because* they were craftsmen. But the question is: Could they fulfil the conditions necessary for admission? Although neighboring landowners, or other persons living outside the town, were frequently admitted to the gild merchant, the gild was primarily an association of, or among, the burgesses of each particular place. But burgess-ship was bound up with the possession of a burgage tenement. Suppose, as might very well happen, that a weaver had no such tenement, would he be admitted? Would David the dyer, who paid a mark in the second year of King John that his messuage in Carlisle "might be a burgage" (I, 71, note 3), have been admitted to the gild merchant of Carlisle, when it was not yet a burgage? Dr. Gross indeed makes the remarkable statement that "the gildsmen were *generally* 'non feoffati'" (page 72). If he means that they did not hold land, this leads to the conclusion that they were *generally* not burgesses! For this assertion he gives three pieces of evidence. One of these, from a modern history of Lyme Regis, I am unable to consult. But of the others, one is to his own second volume, at page 13, where we find that in a list of members of the Barnstaple gild there are 92 names headed "de forinsecis non feoffatis," and 110 headed

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"de intrinsecis et feoffatis." The other is to the same volume, page 236, where we are told that in Totnes every merchant in the merchant gild "non habens tenementum in Totton" must make an (additional?) annual payment of six pence, "et cum tenementum perquisierit quietus erit de predicto redditu." As burgage tenure was a condition of citizenship, so it was almost certainly, for persons who lived in the town, one of the prerequisites for membership of the gild merchant.

Another question suggests itself. Admission to the gild merchant was dependent upon the payment of certain "initiation fees." Dr. Gross charitably conjectures that the charge was proportionate to the means of the new member. But in the only clear and detailed gild rolls which he has been able to print, those of Andover (1279–1348), the usual entrance fee for one who was not the son or husband of a member was sixty shillings (II, 289–320 *passim*). Very few craftsmen at this period owned property worth one-half as much as that, to judge from the Colchester assessments printed in Dowell's *Taxation*. Elsewhere the fee may have been much lower, but a fee there was everywhere. Dr. Gross remarks that "it is necessary to emphasize the fact that craftsmen were freely admitted to the gild in the twelfth, thirteenth and fourteenth centuries" (I, 107). But the references he gives do not actually prove anything more than this, that several craftsmen are found as members in various places. This does not show that craftsmen were, *as a rule*, members. The probability is that the entrance fee, of itself, would keep most of them out.

But if we concede the probability that in some of the towns there were many craftsmen who, for one reason or another, could not get into the merchant gild, is it not also probable that they would come into conflict with the claim of its members to a monopoly of trade? Take the case of the weavers: were they to be allowed to sell their cloth to whomsoever they pleased, or only to the gild members? In one of his later Additions (I, xix), Dr. Gross allows that "on the continent the merchants seem to have oppressed the weavers and fullers because these artisans competed with them in the cloth trade," and adds: "This may help to explain similar oppressions in English towns." But here he concedes one-half of my case, and surrenders the far-fetched explanation about "alien intruders" (page 108).

As to the other half of the case, — the contention that the craftsmen in general, and those employed in the manufacture of cloth in particular, were for some time, as a matter of fact, usually devoid of burgess-rights, — this is closely bound up with the question of burgage tenure, to which I have already alluded. In any case the entry in the London *Book of Customs*, concerning the weavers and fullers of Winchester, Marlborough, Oxford and Beverley; the express declaration of the magistrates of

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Lincoln, in the year 1209, that the fullers had no community (of rights) with the free citizens; and the readiness of the "cives" of London, in 1202, to bribe the King to destroy the weavers' gild, — are all facts which wait for an explanation. And in seeking for such an explanation, if continental analogy is not to be pressed, it is also not to be disregarded. When we find that there were conflicts between the crafts and the governing bodies of the towns in all the countries with which England was most closely connected; in the towns just across the Channel which belonged to the Hanse of London; in the towns of the Teutonic Hanse; in the towns of Scotland, which modelled their constitution largely on that of Newcastle, as Newcastle modelled itself on Winchester (I, 257), — is it going too far to say that the burden of proof lies upon those who maintain that the occasional references to apparently similar difficulties in England do not mean what, on the face of them, they seem to mean? The friction was certainly not so great in England, and it was earlier overcome: it was hardly altogether absent.

Without pursuing the argument further, I may send a parting shot and carry the war into Dr. Gross's camp by the remark that even so rigorous an adherent of "sources" as he is may sometimes be carried off his feet by preconceived ideas. Thus his assertions — surely important ones — that the craftsmen, even when associated in separate gilds of each occupation, still remained in the common gild merchant (I, 115), and that this common gild merchant was afterwards "resolved into" the two classes of mysteries, mercantile and artisan (page 127), are accompanied by none of those impressive notes which are wont to support his statements. They seem to approach, not distantly, those "unproved assumptions" for which Professor Brentano is so justly rebuked.

W. J. Ashley.

État des Habitations Ouvrières à la fin du XIXe Siècle. Étude suivie d'un Compte-rendu des Documents relatifs aux Petits Logements qui ont figuré à l'Exposition Universelle de 1889. Par Émile Cacheux. Texte et planches. Paris, Baudry, 1891. — 8vo, 184 pp.

The Tenement Houses of New York City. A contribution to the study by the Tenement House Building Company. New York, 1891. — 8vo, 33 pp.

The "housing of the poor" problem is daily becoming more urgent. Almost everywhere more is being done to solve it than in America. It is worth while to note the two latest contributions to the subject.

Many years ago M. Cacheux became the owner of a large number of tenement houses in one of the French cities. So deplorable did he ascertain their condition to be that he resolved to study the question *à*

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fond and remedy the evil as far as he could. After years of investigation he published in 1878, together with M. Dollfus, the great work, *Habitations Ouvrières en Tous Pays*, of which a second and enlarged edition appeared in 1889. Not content with publishing what is in many respects the most comprehensive work on the subject, M. Cacheux spent a fortune in building and reconstructing model tenements in France. And now he issues in a more condensed form the results of his studies, supplemented by an account of the plans, *etc.*, submitted at the Exposition of 1889.

A large portion of the book is more interesting than valuable to those who believe that the problem can be solved in great cities only by the construction of large tenement houses; for M. Cacheux has devoted especial attention to small cottages suitable for one or two families. However, the advantages and disadvantages of the tenement system are impartially discussed. Of course each locality must decide for itself; and in the suburban districts of many American cities the cottage plan is no doubt feasible. A brief summary is given of all the different private and corporate enterprises in various countries, and a number of excellent plates are added. To those who wish to ascertain the latest stage of legislation and the most recent details of the various enterprises, the book of M. Cacheux will be welcome.

Of more immediate interest to Americans is the report issued by the Tenement House Building Company of New York, of which the present writer is secretary. The report contains a brief history of the New York legislation; a description, plans and photographs of the houses of the company; and the details of the financial results. It is interesting to note that the experiment is now an assured success, and that the model houses of the company in Cherry Street are considerably superior even to the best type of new tenements recently built in New York. The death-rate is lower, the average length of occupancy greater, the evictions less, and the vacancies far fewer than in the ordinary tenements. The influence of the company's work has been perceptible in many ways: it has led to the partial reclaiming of Cherry Street by the construction of a better class of structures by outsiders; its Kindergarten and clubs have produced a visible effect on the surrounding population; and the attempt to apply the insurance feature to the rent problem has aroused great interest. It is to be hoped that the report will be widely read and circulated, and that it will stimulate individuals and companies in other parts of the city and country to undertake a similar beneficent work. But all such experiments to be successful must be founded on business principles, not on charity.

E. R. A. S.

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Chapters on the Theory and History of Banking. By CHARLES F. DUNBAR, Professor of Political Economy in Harvard University. New York, G. P. Putnam's Sons, 1891. — 8vo, 199 pp.

Laws of the United States relating to Currency, Finance and Banking, from 1789 to 1891. Compiled by CHARLES F. DUNBAR. Boston, Ginn & Co., 1891. — 8vo, 309 pp.

Six years ago Professor Dunbar printed for the use of his students several chapters on the theory of banking. At that time their lucidity attracted considerable attention. These chapters have now been brought down to date and, with some additions, form the present monograph.

The book does not purport to be an exhaustive discussion of the subject. It gives a succinct account of the fundamental character of banking operations, the nature of credit and its practical manifestation in the chief forms, checks and banknotes. Convenient and interesting chapters are added on the Bank of Amsterdam — the chief representative of the original and now obsolete deposit-banks — and on the banking systems of England, France, the United States and Germany.

To the conciseness of the work is perhaps due what seems to the reviewer its only shortcoming. One of the main points with the author is the substantial identity of deposits and notes. It must not be forgotten that this point is a part of the controversy between the banking and the currency schools; and that if we have on the one hand the views of Tooke, Newmarch, Wilson, Fullarton and Mill, we must not neglect the reasoning of Lord Overstone, Torrens, McCulloch and Peel. It was perhaps discreet that Professor Dunbar, like Bagehot, should have avoided this dangerous ground; but a treatment of banknotes which does not even advert to the discussion seems hardly complete. The reviewer is also moved to protest against the praise bestowed, in connection with the same point, upon Macleod. He differs so far with Professor Dunbar as to think that Macleod has on the whole done more to confuse than to clear up the fundamental principles of bank credit. Even Wagner, who, like Professor Dunbar, holds with the banking school to the substantial identity of notes and deposits, characterizes Macleod's general doctrines as completely erroneous; and Knies's and Cusumano's works on credit furnish abundant confirmation of this judgment. An author who, while professedly opposing Lawism, comes to the conclusion that "credit is capital," is one whose particular doctrines must be regarded with suspicion.

For beginners and for all those desirous of seeing the main provisions of different banking systems in a convenient and summary form, this monograph will be very useful. If another edition is to be brought out, it might be well to insert an additional chapter on the history of

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state banking in America. The ample material has never been scientifically arranged and commented upon.

Students of financial history will find their labors considerably lightened by Professor Dunbar's compilation of the federal laws. Five years ago the United States government published all the laws "relating to loans and the currency, coinage and banking" — a compilation that might seem to have rendered Professor Dunbar's work needless. But his book has the advantage, for the student, of printing in full only the really important legislation, and of putting the less important provisions in condensed form and smaller type. The compilation also differs from the government publication by including in Part IV about fifty pages of "Vetoed Bills" and other documents, where the student will find the most important bills that failed to become law.

E. R. A. S.

The Law of Collateral Inheritance, Legacy and Succession Taxes. Embracing the American and many English decisions, with Forms for New York State and an Appendix giving the Statutes of New York, Pennsylvania, Maryland and Connecticut. By BENJ. F. DOS PASSOS, Assistant District-Attorney, New York County. New York, L. K. Strouse & Co., 1890. — 328 pp.

Die Erbschaftssteuer nach ihrer Ausübung in den ausserdeutschen Staaten. Die Berechtigung ihrer Reform in Deutschland und ihrer Einführung als Reichssteuer. Dargestellt von DR. KARL KRÜGER. Tübingen, Laupp'sche Buchhandlung, 1891. — 8vo, 80 pp.

A Handbook to the Death Duties. By SYDNEY BUXTON, M.P., and GEORGE STAPYLTON BARNES. London, Murray, 1890. — 12mo, 109 pp.

The recent enactment of the New York law taxing all successions and inheritances brings up a host of problems, on some of which a little light is thrown by a few recent works. That of Mr. Dos Passos is primarily intended for lawyers, and deals only with the old collateral inheritance or succession taxes. Yet it contains much food for the economist, and will not be superseded even if the new New York plan be followed by other states. The book gives a slight sketch of the history of the American taxes, and discusses chiefly the problems of exemption, of non-resident decedents and some of the more technical legal complications resulting from the application of this tax to real estate. Mr. Dos Passos refers however only to English and American *law*, and makes no attempt to discuss any of the wider economic problems involved. The historical sketch is neither complete nor exact, as

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it omits to mention the New Hampshire and the Alabama legacy taxes which were repealed in 1883, and speaks of the Virginia tax as still existing.

More important for the economist is Krüger's *Die Erbschaftssteuer*. It would be valuable, if for no other reason, in that it gives in succinct form an account of the succession duties in all the principal European states. But the monograph also discusses the general theory and many of the moot points. Thus the two opposite theories are contrasted: that which regards the state as co-heir, represented by Bentham in his *Supply without Burden*, and by many others; and that which views the succession duty simply as a tax. The author inclines to the second opinion, and demolishes for the hundredth time the argument which was so vigorously advanced during the recent discussion in New York, that the inheritance tax involves a confiscation. Interesting also is the treatment of the common objection that the inheritance tax can be evaded by gifts *inter vivos* or *causa mortis*. Although the author might have showed that this danger is by no means so great as is sometimes supposed, he contents himself with calling attention to the way in which it is averted in several countries — by taxing gifts as well as legacies and inheritances. The absence of this feature in the recent New York law is an undeniable defect. England provides for it in her account duty. Many other minor points are treated in the monograph, which can be recommended as a very useful and faithful *résumé* of a subject of growing importance.

Buxton's and Barnes' *Handbook to the Death Duties* is a more detailed description of the complicated English methods. There are really five different taxes, known respectively as the probate, account, legacy, succession and estate duties, and forming a heterogeneous and anomalous system. The main cause of discontent is the inequality in the treatment of realty and personalty. The probate duty is a degressive, not progressive, tax on free personalty, *i.e.* it does not apply to settlements of personalty; the account duty taxes death-bed gifts and personalty given without valuable consideration; the legacy duty on personalty is paid in a lump sum and calculated on the market value of the property; the succession duty on realty, on the other hand, is payable in instalments and is charged only on the value of the life interest of the successor; and, finally, the recent estates' duty of 1889 is levied on all personalty of £10,000 or upwards, while it is applicable to realty only when any individual succession amounts to £10,000 or upwards, or when under a will or intestacy it is made up to that sum by other benefits. The authors suggest certain reforms looking to an abolition of these anomalies.

While the history of the English system is interesting, it would seem

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as if we in the United States could learn more from the Swiss than from the English experiments. It is very much to be hoped that a comprehensive article on the whole topic will soon be published for the benefit of our American legislators.

E. R. A. S.

Principles of Social Economics Inductively Considered and Practically Applied, with Criticisms on Current Themes. By GEORGE GUNTON, author of *Wealth and Progress*. G. P. Putnam's Sons, New York, 1891. — 447 pp.

An encouraging sign of the times is the number of divergent theories of political economy that are appearing. There was a time when we had too much harmony, since it indicated stagnation of thought. Mr. Gunton's book is to be cordially welcomed. Nearly every critical reader will find in it something to disagree with, but all will derive stimulus from the study of it; and there can hardly fail to remain, after the discussion is over, some permanent contribution to economic science.

The work is in part devoted to criticisms of other theories; and these criticisms the reader needs to carefully compare with the theories themselves, as stated by their authors, since Mr. Gunton has been less successful in making accurate statements of other men's views than in presenting his own. Some of the criticisms are really aimed at theories that are not advocated by any one.

In an early part of the work there is a vigorous attack on the time-honored law of demand and supply. It is cost, as the author claims, that fixes the prices of goods; since overproduction may occur in a particular industry without crowding the price of its product below the cost of making it. Goods accumulate in the warehouses, and their price falls to the line of cost; but there the fall is arrested. Production is then checked till the stock in the warehouses is reduced. During an interval the supply exceeds the demand; and yet the price does not fall. This fact is an interesting one, and needs to be cited in any full statement of the law of demand and supply. The stock of cotton goods in existence may for some time exceed the demand, at the price at which such goods are held; but the true supply, in the sense in which that term is used in careful statements of the theory, cannot so exceed the demand without affecting prices. The true supply consists of goods that must be sold within a given period. If for any reason it became necessary for the owners of the cotton goods to realize on them within a fortnight, this necessity would cause the stock in the warehouses to be thrown into what, in a scientific sense, is the supply of such goods; and

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the law would then operate in a striking way. Within the fortnight prices would so adjust themselves that the quantity of goods needing to be sold would equal the quantity effectually demanded. The sale would be "regardless of cost" in an unusually truthful sense.

Recent writers whose theories are cited and criticized may desire to have those theories judged by their own statements of them. I am able to speak definitely concerning one such case. I have at different times presented to the students of economic theory a law of wages, based on the principle of final utility that lies at the foundation of the science of value. Simple supposed cases were made to illustrate the law. If there are ten men at work tilling a farm, each single laborer adds less to the crops than he would do were he one of a company of nine tilling the same farm. We may verify this fact by supposing that the laborers are introduced into the force one at a time, during a succession of years. If the land can be utilized at all by a single worker, it will probably be found that, during the experimental year in which he is alone, he creates a larger product than does any of the succeeding laborers. The second man, coming in the following year, does not double the product realized in the first year; the third does not add a half to the crop harvested in the second year; and when, at last, the tenth man comes, he adds less to the product than did any of his predecessors. For simplicity of illustration all the men are assumed to be of perfectly uniform quality. What is true of laborers on a farm is true of men in a shop, in a mine, on a ship, on a train of cars, *etc.*

In this illustration the men are introduced into the working force one at a time, in order to clearly reveal the fact that the enlarging of the force does not increase the product proportionately. This mode of illustration does not imply that, in actual industry, gangs of men are made up by this process of gradual enlargement. They may be hired all at once; and yet, in the sense in which the term is used, there will be a *final* man in the case. When a crop of wheat is in the elevators there is always a final bushel, the utility of which fixes the selling price of the whole crop; but this is not the last bushel that happened to be carried to the bins. Lessen the supply by one bushel, — take that quantity from any part of any bin, — and you will have taken away what figures as the final increment of wheat. So if you take any one man out of a working company, you withdraw what figures as the final increment of labor.

The theory maintains that such a final man adds, by his presence, nothing to the rent as derived by the landlord from his farm, by the capitalist from his mill, *etc.* He gets as wages all that his presence adds to the product that the remaining men would create if he were not in the company. His pay equals the product that is specifically

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due to his work. What this rent-free man gets others get; and in this sense a man whose labor creates no rent for landlord or capitalist sets the standard of wages. In addition to these final men who work rent-free, there are men who use land, mills, ships, *etc.*, that are too poor to yield a rent to their owners; and these also get their entire product as wages, and help to set the standard of other men's pay.

Mr. Gunton has attributed to me the theory that there are no-rent laborers for the same reason that there are no-rent farms, mills, *etc.*; namely, that there are men of a personal quality too poor to yield a rent. Such men are in order of time the last to be employed by intelligent *entrepreneurs*. In a literal and unusual sense they are final men. They produce less than earlier and better men, they set the standard of wages and drag the better men to their own level. As this is a reversal of my actual theory, all that can be said against it is welcome, as tending to confirm the law of wages that I have in reality advanced.

The theory, as actually advanced, is more directly confirmed by Mr. Gunton's study of interest. In a monograph of the American Economic Association issued in May, 1888, I expressed the view that there are not only lands, but mills, ships and productive instruments of every kind that yield no rent to their owners, and that the product of better mills, ships, *etc.*, may be estimated, in Ricardian fashion, by comparing the gross returns of the rent-paying instruments with those of the rentless ones. These returns from rentless instruments resolve themselves, in the absence of any third factor in production, into wages only. This much of the theory Mr. Gunton accepts. The earnings of certain marginal men absorb the entire product brought into existence by their labor. That these marginal earnings set the standard of all wages is the single remaining point which Mr. Gunton denies. It is probable that when his theory is carefully compared with others that he criticises, the differences that he cites will diminish in number, as they do in the case that I have examined.

Of the study of interest offered in the work it is to be said that it restricts the term interest to a payment for borrowed capital; that it makes this payment to come out of a surplus product due to the excellence of the instruments in which the capital is invested; and that it does not attempt to account for the rate that is paid for the loan. A general surplus includes interest and a contingent profit besides; but why the loan interest should amount, for example, to five per cent of the borrowed capital and the contingent profit absorb the remainder, the theory does not tell us. The no-surplus instruments of production, the antiquated appliances the use of which creates just enough wealth to pay the men who use them, are, in this study, made to represent no-

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interest *capital*. To most men a machine that is too antiquated to earn anything appears to represent annihilated capital.

The essential point in Mr. Gunton's system is that wages are governed, not by the product of labor, but by the cost of it. It is not the cost from the employer's point of view, as the reader may perhaps suppose, but the outlay incurred by the workman himself. When the man gets his pay on Saturday night he spends it, according to Mr. Gunton's views, for labor. Spending money for a living is, in reality, defraying the cost of the labor that the man has to sell. The workman is placed by this theory in a mercantile position, buying the commodity, labor, from a set of tradesmen, *etc.*, who give to him what his habits and mental status require, and selling it at cost to his employer. This is an interesting, original, and, as most readers will think, a somewhat erratic view. It is possible to hold it only so long as wages are thought of as money received from an employer and expended on the maintenance of the worker and his family. If real wages be kept in sight, — if the view be taken that the employer virtually gives the materials of subsistence to his workman, — it becomes impossible to treat wages as a cost or outlay incurred by any one except the employer. No form of logic can make the food that a man receives and eats to be an element of cost. To the working man labor itself represents cost and the means of subsistence represent the return.

If wages be treated as money received from an employer and paid out for a living; and if it be further maintained that, whenever men's labor is sold for less than their living, according to a customary standard, costs, they will do something that tends to permanently reduce the supply of labor, — the theory assimilates itself to a current Malthusian doctrine. This the author will not permit. His theory must not lean on such supports. There must be in it no reference to declining population as a means of sustaining wages; and here lies a radical weakness of the system.

Of the valuable features of the work there may be mentioned the interesting applications of theory contained in the concluding part, and in particular the demonstration made at the beginning that high wages are necessary if machinery is to be used extensively. A few articles of a kind can be made most cheaply by hand. It is only when the millions buy products of a particular kind that it becomes economical to make them in great factories, with machinery and steam or water power. Even a rich man could not have the product of a power loom unless men of the lower and more numerous classes bought them also. A Vanderbilt could not travel by rail unless poorer men rode in the same way.

Mr. Gunton's work will afford some returns to the rapid reader; but

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it will yield to the thorough student returns that are much larger in proportion to their cost. To such a student a book may be most useful which offers the largest number of ingenious and untenable doctrines. The presence of such doctrines in Mr. Gunton's work is far from detracting from its value.

J. B. CLARK.

Luxury. By Professor ÉMILE DE LAVELEYE. London, Swan Sonnenschein & Co., 1890. — 180 pp.

This book treats of a very important subject in a most unsatisfactory way. It would hardly be worth comment, if the writer did not claim to speak as an economist and for those who assert that economists have neglected moral premises. While of course it does not show the impossibility of co-ordinating the two subjects, it at least shows the present difficulties in the way of being at the same time a popular moralist and a scientific economist.

In popular morality luxury implies an idea of blame. It is something that is mischievous if not degrading. Our author repeats this idea again and again. He would make the very definition of luxury contain in it the condemnation of luxury. "Luxury," he says, "consists in the consumption of what has cost great labor to produce, for the satisfaction of spurious needs." Some good, I presume, results from such utterances, and if our author had confined himself to them, I should have no fault to find. He, however, uses them as a cover to express certain economic ideas, which if not crude are at least of too doubtful correctness to be used as the basis of a moral exhortation.

The economic definition of "luxury" is quite different from the moral. In economics luxuries are contrasted with necessities on the one hand and with decencies or comforts on the other. Things belonging to the class last mentioned are such as have come into general use and serve to mark our social position. They are as essential to us as members of a social organism as the necessities are to us as individuals. Luxuries in this classification denote the articles that are somewhat strange to the average man or those he does not use regularly. Luxury often means merely the use of articles that to other persons or in other places would be comforts or necessities. Again it means the satisfaction of desires that are recognized as perfectly legitimate but are out of the reach of most persons.

Apart from the difference in the use of the word, the economic and moral points of view regarding luxury differ radically as to their first premises. The moralist sets up a man with a few simple wants as an ideal. If these wants are primitive, so much the better. Rational con-

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templation is superior to economic activity. On page 74 the author expresses the wish "that instead of having feet which we must constantly protect from stones and thorns, we might have horses' hoofs and so dispense with shoes and stockings and all their attendant discomforts." Again he says: "Our needs are so many weaknesses which divert us from the ideal and overwhelm us in worldly interests." Woman is a great source of temptation to man, a sort of necessary evil, a "relic of primitive barbarism." The only women that our author recognizes are those who "wear brilliant stuffs, ribbons, laces and jewels," and "seek every year some new mode of rendering their garments more inconvenient and more costly."

To one who has acquired an economic point of view these crude premises are repugnant. Society assumes a higher type and its moral tone is improved through the growth of new wants and the increase of their intensity. The increase of economic activity that accompanies the growing intensity of new wants purges society of the primitive and barbaric instincts and sentiments. There is more "primitive barbarism" in the average masculine morality than in the dress of our mothers and sisters. If M. de Laveleye's premises are good morality, it will take a long time to harmonize economic and moral discussions. One of the sciences certainly needs a radical transformation.

SIMON N. PATTEN.

Zur Social- und Gerwerbepolitik der Gegenwart. Von GUSTAV SCHMOLLER. Leipzig, Duncker und Humblot, 1890.

Better than the *Grundfragen* or the *Litteraturgeschichte*, this volume of addresses and essays by Professor Schmoller shows us both the author's real position as one of the leaders of the historic school and also in somewhat clearer outline the character and the limits of the movement which this school represents. The period covered is from the close of the Franco-German War to 1890. The first essay is that read in October, 1872, at the New Congress at Eisenach. The North German Confederation seemed to show, as its work grew more complete, how narrow were the limits through which the old Economic Association could act. The achievements of the liberal school had been great, though largely negative. Freedom had been won from serious obstructions, like that upon the mobility of labor, and a great work of preparation had been done which the "men of relativity" seem not quite fairly to recognize. Nothing however is clearer than the failure of the "liberal" economists to see that a wholly new set of conditions had arisen, requiring a new aggressive and positive economic philosophy. The men who in June, 1872, gathered at Schmoller's home, saw the new

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need and acted upon it. The essays show us, in half-popular yet strikingly interesting form, as much of the history of the new movement as can anywhere be found in such small compass. They deal with many of the practical topics — tenement houses, profit sharing, breach of contract, *etc.* — which the *Verein für Socialpolitik* has done so much to popularize.

In the entire volume *laissez faire* in whatever form gets of course no quarter. Our feeling that this German school has never been fair to what is permanent and indestructible in the doctrine of economic freedom is here strongly confirmed. *Laissez faire* is treated as if its English adherents never had a thought of the state's positive functions; yet the steady practical development in England since 1832 of an idea of the state as a necessary and powerful ally in social regeneration was a vital part of those splendid energies that characterize the most illustrious of the earlier English liberals. If we had no other sources of information than those furnished by such writers as the author of the present volume, we should do no justice to the fact. One proof that the author has not fairly acquainted himself with the whole field of the English development is that with so doughty a champion of German liberalism as Schulze-Delitsch he is not only just but sympathetically so. The conclusion is not to be avoided that, had Professor Schmoller known the English "liberal economics" as well as he knew the German movement of which Schulze was so able a champion, he never could have made the issue between *Historismus* and Manchester so definite and sharp. His criticism is too often as if he had taken his economic reckoning only from McCulloch. There is hardly a hint in the volume that *laissez faire* was ever used in England except as an assumed principle from which safe deductions could be drawn. In fact it was as often a mere practical maxim or rule, to be used according to a varying economic experience. How indeed is it possible, upon the author's own principles, to ignore the sharp and wide divergence that exists between extremely different uses of *laissez faire?* There are conditions under which it would be far safer to argue deductively from *laissez faire* as an assumed principle (*e.g.* conditions in which self-interest could be counted upon with extreme certainty) than to argue from inductive uses of *laissez faire* in many practical problems (*e.g.* much of the legislation concerning eight hours). We have here a scale of difference that is very wide, on which we pass from comparatively safe deductive applications to the most risky of inductive ones. The *actual* English economics have recognized this fact. Legislation since 1832 is filled with it practically. Yet Professor Schmoller speaks invariably as if Nassau Senior's conception of *laissez faire* held despotic sway over English industrial development.

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The author expresses the same confidence in this volume that he did in the *Litteraturgeschichte*, that economics will more and more become one with history and statistics. We ask at once: Is there to be no philosophy of this succession of industrial facts and events? Without deduction no step can be taken to throw this history into order and unity. We are even told that *causes* are to be sought. This too would drive us on to the same forbidden ground. As to his prophecy, it is clear that economists are recognizing not less but more the necessity of deduction. Not to speak of so manifest a reaction as that of the Austrians, we have but to observe the recent expression of opinion among economists like Wagner, Cohn, Marshall and Gide, to feel sure that a growing need is felt of something more than descriptive history. Professor Sidgwick said a few years ago that the weakness of the current ethics was that syntheses were attempted before adequate data had been gathered. This is doubtless true in economics, and the historians are rendering supreme service in making possible a wiser and more efficient use of deduction. Schmoller seems often to speak indeed as if his real meaning were that deduction was resorted to prematurely.

If we turn from this disputed field there is only most cordial praise to be given to his book. The essays are informed by that singular unity of opinion which only large and generous learning can give.

JOHN GRAHAM BROOKS.

A Plea for Liberty. An argument against Socialism and Socialistic Legislation, consisting of an introduction by HERBERT SPENCER and essays by various authors. Edited by THOMAS MACKAY. New York, D. Appleton & Co., 1891. — xxii, 414 pp.

In this volume *laissez faire* and individualism present in formal array the arguments by which they hope to check the tide of socialism which seems to them so threatening at the present day. State interference is assailed from both the theoretical and the practical standpoint. Mr. Spencer's "Introduction" summarizes, without additions, his well-known doctrines as to the functions of the state and the nature of liberty. The philosopher conceives that every man must have a master, "but the master may be Nature or may be a fellow man." Only those who are under the impersonal coercion of "nature" are free. And from this preliminary sundering of man from "nature" flows the old stream of protest against the tendency to substitute "status" for "contract" — the militant for the industrial order of society. Of the other essays, that on "The Limits of Liberty," by Wordsworth Donisthorpe, is the only one that deals with the philosophical side of the subject. Mr. Donisthorpe's basis for his individualistic faith will be apt to impress the

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reader as much more tenable than that of Mr. Spencer, and the whole spirit of his essay as much more rational than that of the "Introduction." Mr. Donisthorpe will have no *a priori* principle by which to determine the limits of liberty; these are to be discovered at any given period only through the historic method. "History teaches us that there has been a marked tendency (in the main continuous) to reduce the number of state restrictions on the absolute freedom of the citizens. . . . The proper aim of the reformer therefore, is to find out, by a study of history, exactly what those classes of facts are in which state-interference shows signs of becoming weaker and weaker, and what those other classes of acts are in which such interference tends to be more rigorous and regular. And he will then, to the utmost of his ability, hasten on the day of absolute freedom in the former class of cases and insist on the most determined enforcement of the law in the latter class."

With certain modifications, necessary in order to avoid fatalism, this use of history as a basis for political faith would be approved by the most rabid socialist. His interpretation of history, however, might differ widely from Mr. Donisthorpe's. It is to be said that the latter intimates a conviction that he is following in the footsteps of Mr. Spencer. But while the conclusions of the two writers closely coincide, there is a very obvious distinction in the ways of reaching them. Mr. Donisthorpe attains individualism by induction from political history; Mr. Spencer, by deduction from his definition of liberty.

On the practical side, the book begins with an essay by Edward Stanley Robertson on "The Impracticability of Socialism," mainly a refutation of Schäffle's *Quintessence of Socialism*. It is interesting to compare with Mr. Spencer's summary distinction between man and nature, noticed above, the insistence of Mr. Robertson (pages 31, 32) that "the human race and human society are just as much parts of nature as the heavenly bodies and the sunshine and rainfall," and his complaint that the socialists fail to give due weight to this fact.

The remaining ten essays in the book deal with a variety of problems of contemporary interest, presenting, in most cases with much vigor, the arguments against the assumption of new powers by the state. Among these problems are "Free Education," "The Housing of the Working-Classes and of the Poor," "Free Libraries" and "Electrical Distribution." Charles Fairfield gives an unfavorable account of "State Socialism in the Antipodes," and deals very unceremoniously with Sir Charles Dilke's statements about Australia in *Problems of Greater Britain*. "Liberty for Labor" by George Howell, gives the *laissez-faire* view of factory laws, the sweating system and trades-unions and seeks to draw a line in each matter beyond which the government must not intrude. The editor writes on "Investment" taking strong ground against monop-

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oly. The concluding essay, by Auberon Herbert, endeavors to show "The True Line of Deliverance." The true line, as may be surmised, is open competition.

There is very little, if anything, in this collection of essays that has not been presented elsewhere. The work finds its justification in that it furnishes a convenient arsenal for the adversaries of socialism and state interference in connection with all the various phases of discussion at the present time.

WM. A. DUNNING.

An Introduction to Social Philosophy. By JOHN S. MACKENZIE, M.A. New York, Macmillan & Co., 1890. — 390 pp.

This book contains, in an expanded form, the substance of the Shaw Fellowship Lectures delivered by the author at the University of Edinburgh, in January, 1889. These lectures have been wrought up into several continuous essays, in which it is sought to develop and apply a metaphysic of social life, as distinguished from an empirical social science; the neo-Kantian way of looking at things furnishing the special philosophical standpoint.

The treatise opens with a carefully studied essay on the "Scope of Social Philosophy"; next unfolds the nature of the social problem, which calls for a philosophical treatment; and then presents the author's conceptions of "The Social Organism," "The Social Aim" and "The Social Ideal," with extended analysis and criticism of contrasted conceptions and aims. Finally, in a chapter on "The Elements of Social Progress," the special problems of the various practical sciences are more particularly discussed, in a consideration of the principles on which these sciences "must proceed in their efforts to determine the ideal of human progress and to contribute to its realization."

Each of the practical sciences, — economics, politics, ethics and education, — for the closer determination of its special problem, abstracts it from the general problem of the social welfare; hence a tendency to aberration or narrowness in conceptions in each sphere (notably marked, *e.g.*, in that of economics), which seems to call for the corrective and guiding influence of a comprehensive social philosophy. In practical life indeed, as well as in theory, an excessive tendency to specialization — an undue absorption in particular aims and interests — evinces the need of some mode of thinking which shall "place the various ends of life in their right relation to each other." And social philosophy, as Mr. Mackenzie conceives it, while dependent upon the particular sciences, can render to them needed services. Negatively, it can criticize the conceptions of which they make use, and endeavor

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to define the place of each in relation to a larger whole. Positively, philosophy enables us at once to gain *ideas* of the principles by which objects are determined and *ideals* of their further determination. By the connected view of experience which it enables us to take, it "helps to suggest the real meaning of processes in which only a partial discovery has yet been made by the particular sciences." The ethical sciences could hardly exist without philosophy; "for here the whole question is one of what we mean or what we want to be at." "The facts are in such cases created by ourselves; and if our meaning changes, the facts change too." And as to social philosophy, the relations of human beings in society are more obviously liable to change in accordance with the development of their thoughts than the general laws of conduct are. It may be worth noting here how forcibly this view is supported by an observation in Professor Marshall's recent work on economics as to the historically evidenced effect of new ideals in gradually modifying human nature itself. While these ideals must wait on growth, Professor Marshall remarks, "they may always keep a little in advance of it, promoting the growth of our higher social nature, by giving it always some new and higher work to do, some practical ideal toward which to strive."[1]

Under the caption, "The Social Problem," are considered the practical issues of the present time on which light is to be thrown by social philosophy. The well-being of people generally is the distinctive concern of the present time, as past periods have been interested peculiarly in that of the nation as a whole or of individuals in it. To raise up the humble and to teach the exalted how to use their power, is the problem, — whose urgency is not more evident than its difficulty. Society has passed the stage of subjugation and is in transition from that of liberation to the reorganization which is hardly yet beginning to show what course it may take. The people have won a liberty which seems so far to issue in another sort of bondage. The industrial civilization born of liberty has mastered its inventors; men are harnessed to things as never before, mind is subordinated to matter — even our ideas being dominated by mechanical ways of thinking. The fine personal relations of the old-time social world are dissolved; society is in a fluid state, and while there are signs of crystallization at one point and another, we do not yet see the way clear to the building up of a new and better order on the basis of the liberty that has been achieved. "There is nothing to control us, and we have not yet learned self-control."

What is needed is some principle of more perfect union; and the ideas which impress our author as most likely to be helpful are those

[1] Principles of Economics, I, 47.

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of the organic nature of society and the spiritual nature of man. It is as combining the life of the parts with harmonious co-operation and development, not as involving any close analogy with biological facts and processes, that he would maintain society to be an organic whole. The social ideal as organic is opposed to monadistic independence and to monistic absorption of the individual, and the organic character is given by the psychical element in man. A philosophy which begins with Thought instead of Force, must make no mean account of Thought as a social factor; and Mr. Mackenzie, disregarding the most current fashions in sociological discussion, does not ignore or belittle the potency of mind in the social evolution. It is in the reflective rational consciousness, he thinks, that the organic unity of society is possible as an ideal. It is because man is a rational that he is a social animal. In leading up to the conclusion that man's true end is self-realization — by its very nature a social end — a criticism of other conceptions is given, especially, and *in extenso*, of the difficulties of hedonism in its various phases.

For realizing this end, it is inquired further what type or ideal of social living is under given conditions most favorable. A careful examination of various ideals — liberty, aristocracy and equality — brings out the good in each, while elucidating its difficulties and inadequacies. The conclusion is that the ideal for a progressing society is found in an organic combination of what is best in these ideals, *e.g.* such liberty as is needed for development, such socialism as would prevent the subjugation of man by material necessities and such aristocratic influence as is needed for wise social guidance. Yet over and above these elements, to constitute an organic union, is needed a combining principle — the recognition of vital relationships. Here indeed the true key-note of our social need is struck: the recognition of vital relationships not only between individuals, but between the various interests that are involved in their social life, is the urgent requisite for social well-being. The special fault of modern social life seems to be the abstraction of separate departments and interests from kinship or unity with each other.

Having this ideal in view, we are led at last to a consideration more in detail of the principles which should guide the economist, the politician and the educationist in the treatment of their special departments.

The economist, in considering the "subjugation of nature," is not likely to underrate the importance of material conquests. Social philosophy and literature have at times, in view of the blunders of civilization, put forth exaggerated protests such as that of Tolstoi against industrial tendencies; but only in further civilization, not in industrial retrogression, is a remedy for the errors to be looked for. What is needed, in the judgment of the author, is a more careful determination of the

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directions in which it is desirable that the conquest of nature should be carried out. This means the determination of the true nature of wealth. The critic does not ignore the difficulty of making distinctions in economics between utilities as desired and as needed, since the recognition of other standards of wealth than that of the market introduces considerations which belong to other sciences. But in the opinion that economics have lost in practical value by neglecting to investigate the question of ultimate values, not to be estimated simply by liking, he is in line with recent economic thought. The increased attention which economists are giving to the consumption of wealth is in accord with his recommendation that luxury be made the subject of fuller investigation.

Naturally Mr. Mackenzie favors such a conception of economic science as includes social policy, and also such measures of state control as may be needed "not to hinder free competition, but to hinder it from becoming lawless."

Concerning the work of the politician and the educationist, the discussion is more brief and general, and its general tenor will readily be inferred. It would have been quite in the vein of the treatise, I think, to bring out more fully what is here and there suggested; *viz.*, that a true philosophy of social life, by bringing the different departments into a closer sense of mutual dependence for the efficient working out of their respective problems, might greatly help to foster "vital relationship" between individuals and interests. As an indication of what is intended it may suffice to quote Roscher's remark, that the repression of the individuality of the worker in modern industry is a tendency that strikes at the successful continuance of democracy itself.

To conclude: Mr. Mackenzie's work contains much valuable thought and abounds in felicities of expression. It constitutes a useful contribution to a needed discussion and should be followed up by more work upon similar lines. Certainly a need appears to exist for something more than a purely empirical study of society and for such unifying and insight-giving conceptions as an adequate philosophy of human nature may supply.

GEORGE B. NEWCOMB.

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BOOK NOTES.

THE title of A. Debidour's recent work — *Histoire Diplomatique de l'Europe, depuis l'ouverture du Congrès de Vienne jusqu'à la clôture du Congrès de Berlin* (two volumes, Félix Alcan, Paris) — and the author's statement of his purpose, which is to set forth all the political transactions between 1814 and 1878 which have had for their end the establishment, the confirmation or the disturbance of the political equilibrium of Europe, — sufficiently indicate the scope of this book. The admirable qualities which the author brings to the work are well shown in his account of the events which led to the Franco-German War — an account marked by intelligence and fairness. It is not easy for a foreigner to consider these events without some feeling of partisanship, and it goes without saying that it must be impossible for a Frenchman to do so; but M. Debidour has kept his feelings out of his work, and his narrative and his judgments alike are remarkably free from any trace of personal affection or antipathy. The picture he presents is full of color, but, we think, veracious.

In the *Fin d'Empire* (Paul Ollendorf, 1890), Paul Gaulot brings to a close his three-volume history entitled "La Vérité sur l'Expédition du Mexique." This volume gives less satisfaction than its predecessors: it displays the same crude method of composition, by which long and unimportant quotations are embodied in the text; the same lack of thorough study and explanation of the spirit of the international relations between France, Mexico and the United States; and, in addition, it is quite as devoid of broad ideas as it is of good character-sketching. The very few comments made on the action of the United States in connection with the downfall of Maximilian's empire are so superficial as to indicate that the author has no knowledge whatever of the printed volumes of the diplomatic correspondence of the United States which cover this period. He does not seem to have used even the information which other books on the same subject as his, and in his own language, have placed before him.

With the appearance of the third part of the second volume of Laband's *Staatsrecht des Deutschen Reiches* (Freiburg i. B., Akademische Verlagsbuchhandlung von J. C. B. Mohr, 1891), a great work is brought to a worthy conclusion. The previous instalments of this book have been very fully noticed in the QUARTERLY (III, 123; VI,

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173). This last part (281 pages) is devoted to the financial system of the German Empire. In addition to a clear and comprehensive account of this system, it contains a most satisfactory discussion of the character of the budget and of the empire as a fiscal person; a very valuable review of the most recent German literature upon the subject of the budget; and, finally, a full and careful index to the entire work. A great public lawyer is not often at the same time a master of the science of finance; but Dr. Laband appears to be equally at home in both fields. A careful study of his treatment of the fiscus would be particularly profitable to American lawyers and economists: it would help them out of many difficulties in dealing with the property rights and obligations of our own commonwealths.

From the Clarendon Press has been issued a reprint of Bentham's *Fragment on Government* (Oxford, 1891), edited, with an introduction, by T. C. Montague. The republication in agreeable form of this amusing as well as suggestive work of the great utilitarian will be appreciated by students of both legal and political philosophy. Mr. Montague's introduction touches upon the general character of Bentham's genius, describes in a judicial spirit his position in the history of the science of legislation, with special reference to his relations to Montesquieu and Beccaria, and concludes with an examination of the theory of sovereignty as outlined in the *Fragment*. Bentham is far from perfect definiteness on this last-mentioned subject, but his editor can scarcely be said to have improved upon him or to have succeeded in presenting a clear conception of the elusive principle.

In *Rousseau und die Deutsche Geschichtsphilosophie* (Stuttgart, Goschen'sche Verlagshandlung, 1890), Richard Fester offers a contribution to the history of German idealism. Starting with an examination of Rousseau's general view of human history, the author seeks to trace the influence of this view in the ideas of the German *Aufklärung* and in the philosophical systems of Kant, Fichte and the other great thinkers, down to Hegel. To one who has spent much time in exploring the misty realms of German idealism Mr. Fester's treatment of his subject will probably seem as successful as could be expected; and there is that in his work which will be of use to students of political science if they have the patience to find it.

It is hard to see the necessity of Professor Friedrich Kleinwächter's work on *Die Staatsromane: Ein Beitrag zur Lehre vom Communismus und Socialismus* (Vienna, Breitenstein, 1891). He divides the Utopias into political and economic. The political romances he deems very wearisome and unimportant, "herzlich langweilig und belanglos"; but the economic romances he calls valuable and interesting. He divides them up into the socialistic, the communistic and the semi-communistic

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romances, represented respectively by the works of 1) Plato, Harrington, and Fénélon; 2) More, Doni, Campanella, Andräa, Vairasse, Morelly, Fontenelle, Retif de la Bretonne and Cabet; 3) Bellamy and Hertzka. With the exception of the authors mentioned in the last class, all these writers have been repeatedly described by French and German publicists, and Professor Kleinwächter has nothing really new to say about them.

The well-known work of the Belgian publicist Émile de Laveleye, *De la Propriété et de ses Formes Primitives* has just been republished in a fourth edition (Paris, Félix Alcan, 1891). The preface tells us that it is so to say a new work. But in reality the ideas are the same, although the old chapters have been brought down to date and many new chapters added. Among these are accounts of the village community system in Scandinavia, Scotland, America, Spain, Italy, Ireland, Japan, Denmark, Egypt and Turkey. The total number of pages has been increased from less than 400 in the first edition of 1874 to 562 in the present edition. M. de Laveleye still clings to his original position in spite of the attacks made on him by Fustel de Coulanges and others. But he is careful to say that he does not wish to be understood as sketching a plan of social reform, and he seems to be a little less sanguine than before as to the final return of modern society to the primitive system of the village community. He now contents himself with regretting that America and Australia sell their public lands outright, instead of leasing them; he advises the retention or purchase by rural communities of a communal domain, and he sees great advantages in adopting the Physiocratic plan of a land-tax as the main source of public revenue. The chief value of the book will always consist in the proof that private property is an historical, not an absolute, category.

In the first volume of the University Extension Series, edited by Professor Symes of Nottingham, H. de B. Gibbins gives a *résumé* of *The Industrial History of England* (London, Methuen & Co., 1890). It professes to be only an introduction to a fuller study of the subject. It traces in broad outlines the agricultural, commercial and industrial development from the Roman period to the modern age of the factory system. In the main Mr. Gibbins follows Professor Rogers, including his account of the "golden age" of the laborers after the revolt in the fourteenth century. The account of the "industrial revolution" is among the best chapters in the little book, — which may be highly recommended to beginners.

Professor Funck-Brentano has edited an admirable reprint of Antoyne de Montchrétien's *Traicté de l'Œconomie Politique* (Paris, Plon Nourrit et C^ie^, 1889). The work will always be of interest as the first one in history which expressly applies the term political economy

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to the subject of which it treats. It is to Montchrétien, more than to any one else, that we owe the prevalent use of the adjective "political" to describe a science which in reality is social. The editor has added numerous notes and a preface of 120 pages, which is practically a treatise on the industrial organization of the middle ages in France.

The two classic works on commercial crises have recently been republished in considerably enlarged editions. Clément Juglar's *Des Crises Commerciales* has appeared in a second edition (Paris, Guillaumin, 1889) after a lapse of twenty-nine years. Max Wirth's *Geschichte der Handelskrisen* (Frankfort a. M., Sauerländer, 1890) has been more fortunate in that the fourth edition has been called for after the expiration of only eight years since the third. Although Juglar's book makes the impression of greater elaborateness, Wirth's work is in reality more comprehensive as it is also more valuable. Juglar calls attention chiefly to the currency and banking problems, Wirth goes somewhat deeper and refers to the general social condition. The new chapters of Wirth deal with the international stagnation from 1883 to 1887, trusts and pools, strikes, the new speculative mania, the Argentine crisis of 1890, the silver question and the collapse of the Panama canal.

A suggestive little essay on *Modern Changes in the Mobility of Labor, especially between Trade and Trade*, has been published as a report to the Toynbee Trustees by H. Llewellyn Smith (London, Frowde, 1891). Mobility between place and place, or more especially migration from country to towns, was discussed by Mr. Smith in Booth's *Life and Labor of the People*. The present monograph deals only with mobility as between trade and trade. The author has studied the problem in the factories of Bradford and West Riding and concludes that, while machinery tends to increase the number of processes into which an employment is divided and thus decreases the power of mobility among the workmen, yet on the other hand "the various members of the group of workers who produce a particular article tend simultaneously to become less and less specialized with regard to the production of that article, and their range of mobility, narrowed as regards the power of interchange among themselves, is as a rule widened as regards the power of interchange with those performing corresponding processes of other trades." But Mr. Smith notes so many counter-tendencies to these main tendencies that the results of his investigation become somewhat uncertain.

In *The Scottish Railway Strike, 1891: A History and Criticism* (Edinburgh, Wm. Brown), Professor James Mavor of Glasgow has given an interesting account of an interesting agitation. He sums up the causes as, first, the neglect and consequent accumulation of grievances, many of them individually petty; and secondly the severe competition

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between the two chief Scottish railways. This leads Mr. Mavor to note that state ownership of these railways would have done away with at least one of the chief reasons of the strike. The central issue of the strike, however, was a reduction of hours of labor. The compromise settled nothing, leaving the matter still open for future adjustment. And while Professor Mavor is justly severe on the companies for seeking to develop the line at the expense of the men, it is interesting to note that he opposes the idea, which has been defended on this side of the water also, of preventing in some way combinations of railway employees on the score of public convenience. Given an inequality between the power of a large corporation and that of the individual employees, it is hard to see how justice can be attained by providing liberty for the stronger party and restriction for the weaker.

Dr. Adolf Braun has begun the publication of a series of monographs giving the laws relating to workmen's protection and insurance in all the European states, with essays on industrial history, statistics and labor legislation in each state. The first monograph treats of Germany, under the title *Die Arbeiterschutzgesetze des Deutschen Reichs* (Tübingen, Laupp, 1890), and contains not only the laws but also a valuable history of the agitation in the empire and in each of the commonwealths. If the other European states are treated with the same fulness, we shall soon have a comprehensive history of the entire movement.

The second number of the Toronto University Studies in Political Science is entitled *Municipal Monopolies and their Management*, by A. H. Sinclair (Toronto, Warwick & Sons, 1891). Chapter I gives the comparatively familiar arguments as to the nature of municipal monopolies. In the second chapter we find a rather interesting comparison, although on the old lines, between the results of private and public management. The conclusions of the author are conservative. Professor W. J. Ashley, the editor, contributes a few interesting words by way of preface, in which he observes that the conclusions of the essay should moderate the ardor of extremists on both sides, and adverts to the fact that the desire to secure improved conditions for labor is at the bottom of the English agitation, as over against the more purely financial considerations urged in America.

In 1888 some members of the National Liberal Club in London determined to establish a periodical dinner at which papers on economic questions should be read and discussed. As an outcome of these dinners a "Political Economy Circle" was formed, and the first volume of its *Transactions* has just been published (P. S. King & Son, 1891) under the editorship of the secretary, J. H. Levy. The volume before us contains among other essays an orthodox "introductory address on the economic principles which should guide legislation with regard to

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the occupation of land" by the chairman, Rt. Hon. Leonard H. Courtney; a criticism of the report of the gold and silver commission by Alfred Milnes; an essay on "the rate of interest" by Sidney Webb, and an article on "the migration of labor" by H. L. Smith. The "Circle" shows a curious blending of individualist and socialist members. Most of the essays are reprints from articles that have already appeared in English and American publications; and to an outsider the hope of the committee "that it will be able to propagate over a wide area economic truths" seems a little exaggerated.

The Question of Copyright, edited by George Haven Putnam and published by the Putnams (1891), may perhaps be best described as a Copyright-League scrap-book. Much material, literary and legal, is thrown together with little system. Several excellent essays, historical and controversial, by the editor, by R. R. Bowker and by Brander Matthews, including the latter's "Evolution of Copyright,"[1] are reprinted; and a good deal of material is given for the study of English and American copyright law. The recent amendments to our Revised Statutes (the so-called Copyright Act of March, 1891) are given in full; also the clauses of the McKinley Tariff Act which bear upon the subject — but, curiously enough, without anything to indicate whether the articles mentioned are free or dutiable. The summary of "existing" foreign laws is inexcusably out of date: Germany, for example, is represented as still governed by the confederate treaty system, no mention being made of the regulation of the whole matter by the imperial laws of June 11, 1870 and January 9–11, 1876. There is no index.

The Society for Political Education has published *The Reader's Guide in Economic, Social and Political Science*, edited by R. R. Bowker and George Iles (New York, Putnams, 1891). It is nominally a second edition of the *Bibliography of Political Science* published some ten years ago, but it is practically a new work. The arrangement of subjects, although a vast improvement on the previous edition, is not yet a perfectly logical one: down to the heading "Political Science" it is indeed scientific, but after that it is somewhat confused. The preface states that the classification was made "after careful comparison with the scheme of the Columbia Faculty of Political Science, and largely on its lines." The Columbia Faculty of Political Science desires to explain that it is not responsible for the whole classification. The *Guide* contains 169 pages. It does not pretend to be exhaustive, especially in regard to foreign works, but it will no doubt be of great service to all but special students. The courses in political science in the principal colleges are added in an appendix.

[1] POLITICAL SCIENCE QUARTERLY, V, 4; December, 1890.

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